

**IDAHO
ATTORNEY
GENERAL'S
REPORT**

FOR FISCAL YEAR 1981

BEGINNING JULY 1, 1980

AND ENDING JUNE 30, 1981

AND

OPINIONS

FOR THE YEAR

1981

DAVID H. LEROY

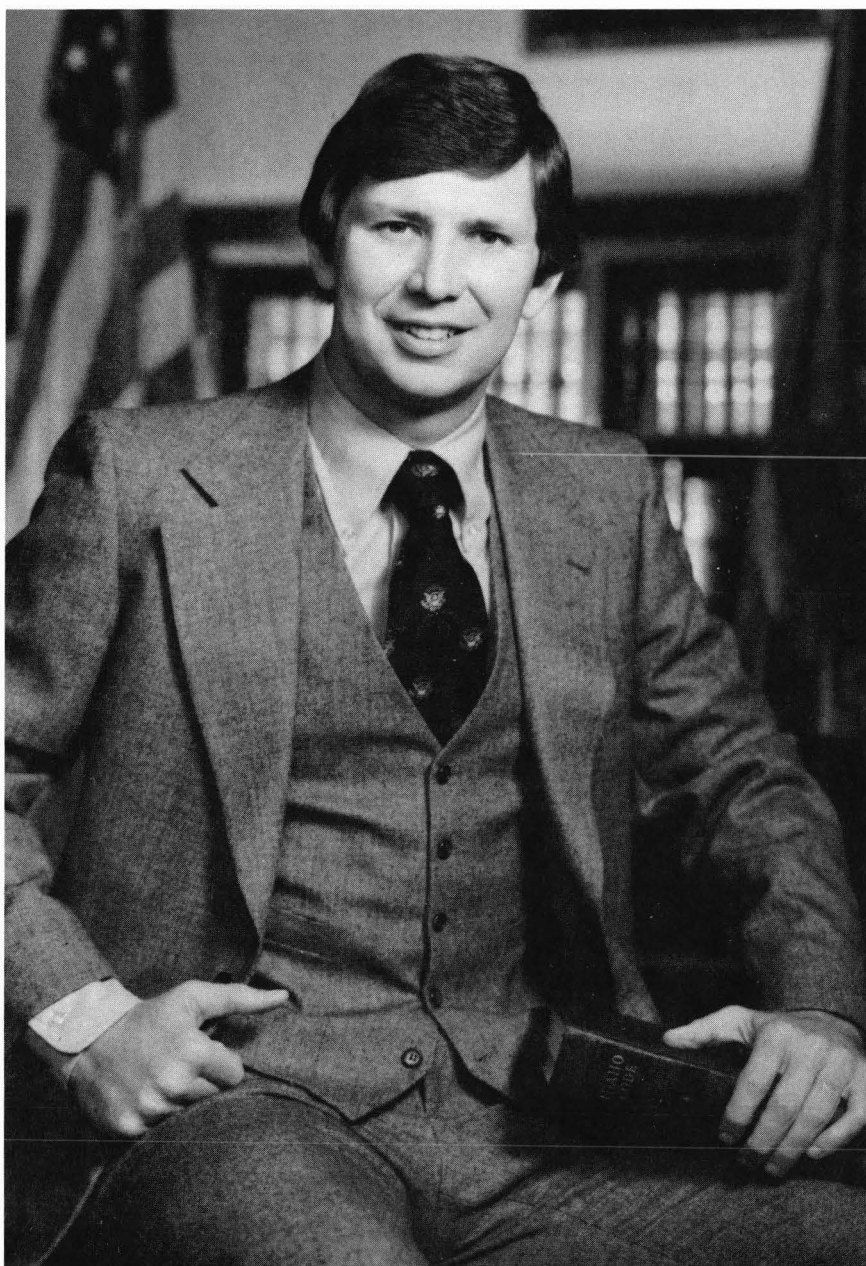
Attorney General

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ATTORNEYS GENERAL OF IDAHO

GEORGE H. ROBERTS	1891-1892
GEORGE M. PARSONS	1893-1896
ROBERT McFARLAND	1897-1898
S. H. HAYS	1899-1900
FRANK MARTIN	1901-1902
JOHN A. BAGLEY	1903-1904
JOHN GUHEEN	1905-1908
D. C. McDOUGALL	1909-1912
JOSEPH H. PETERSON	1913-1916
T. A. WALTERS	1917-1918
ROY L. BLACK	1919-1922
A. H. CONNER	1923-1926
FRANK L. STEPHAN	1927-1928
W. D. GILLIS	1929-1930
FRED J. BABCOCK	1931-1932
BERT H. MILLER	1933-1936
J. W. TAYLOR	1937-1940
BERT H. MILLER	1941-1944
FRANK LANGLEY	1945-1946
ROBERT AILSHIE (Deceased November 16)	1947
ROBERT E. SMYLIE (Appointed November 24)	1947-1954
GRAYDON W. SMITH	1955-1958
FRANK L. BENSON	1959-1962
ALLAN G. SHEPARD	1963-1968
ROBERT M. ROBSON	1969
W. ANTHONY PARK	1970-1974
WAYNE L. KIDWELL	1975-1978
DAVID H. LEROY	1979-



DAVID H. LEROY
Attorney General



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

The Honorable John V. Evans
Governor of the State of Idaho

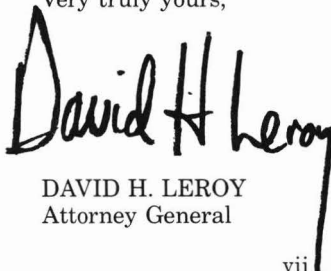
Idaho State Legislature

Pursuant to *Idaho Code*, § 67-1401 (12) the Office of the Attorney General has historically submitted on a biennial basis the report on the affairs of the Office of the Attorney General. It is my feeling that a biennial report has proved insufficient to keep you adequately informed about the fast moving legal business of the state. I propose, starting with fiscal year 1981, to report to you on an annual basis in the same volume which we publish yearly for Opinions and Guidelines of the Attorney General.

Since taking office in 1979, the division chiefs of the nine divisions and I have collaborated to establish management and policy goals for each upcoming year. This management by objective approach and evaluation has proved to be an excellent administrative tool. The fiscal year 1981 report which you find in the ensuing pages will be in the form of reports by each division chief on how well we have accomplished the goals which we set prior to fiscal year 1981. In addition, you will find information on the various volume, frequency, caseload and service statistics for the calendar year, and a list of all of the new court litigation filed on behalf of and against the State of Idaho during the last fiscal year. By tightening the criteria and upgrading the research requirements, we have reduced the frequency with which we issue formal opinions. We rendered instead 97 written guidelines, of which 31 major efforts are reprinted herein.

I am pleased to offer this report and opinion volume in the spirit of a continued improvement of communications and public service within and between the executive and legislative branches of Idaho State government and the citizens we represent.

Very truly yours,


DAVID H. LEROY
Attorney General

FISCAL YEAR 1981 ANNUAL REPORT
of the
ATTORNEY GENERAL
of
IDAHO



**For the period beginning July 1, 1980
and ending June 30, 1981**

DAVID H. LEROY
Attorney General

OFFICE OF THE ATTORNEY GENERAL

Administrative

David H. Leroy — Attorney General
Larry K. Harvey — Chief Deputy
Tanya R. Rossum — Office Administrator
Lois Hurless — Administrative Assistant
Kathleen Haynes — Fiscal Officer

Division Chiefs

Roy L. Eiguren — Legislative/Administrative
Lynn Thomas — Appellate
John Michael Brassey — Business Regulation
Michael Kennedy — Criminal Justice
Russell T. Reneau — Chief Investigator
Thomas Frost — Administrative Law & Litigation
Robie Russell — Local Government
John Sutton — State Finance
Donald Olowinski — Natural Resources
Michael Johnson — Health & Welfare

Deputy Attorneys General

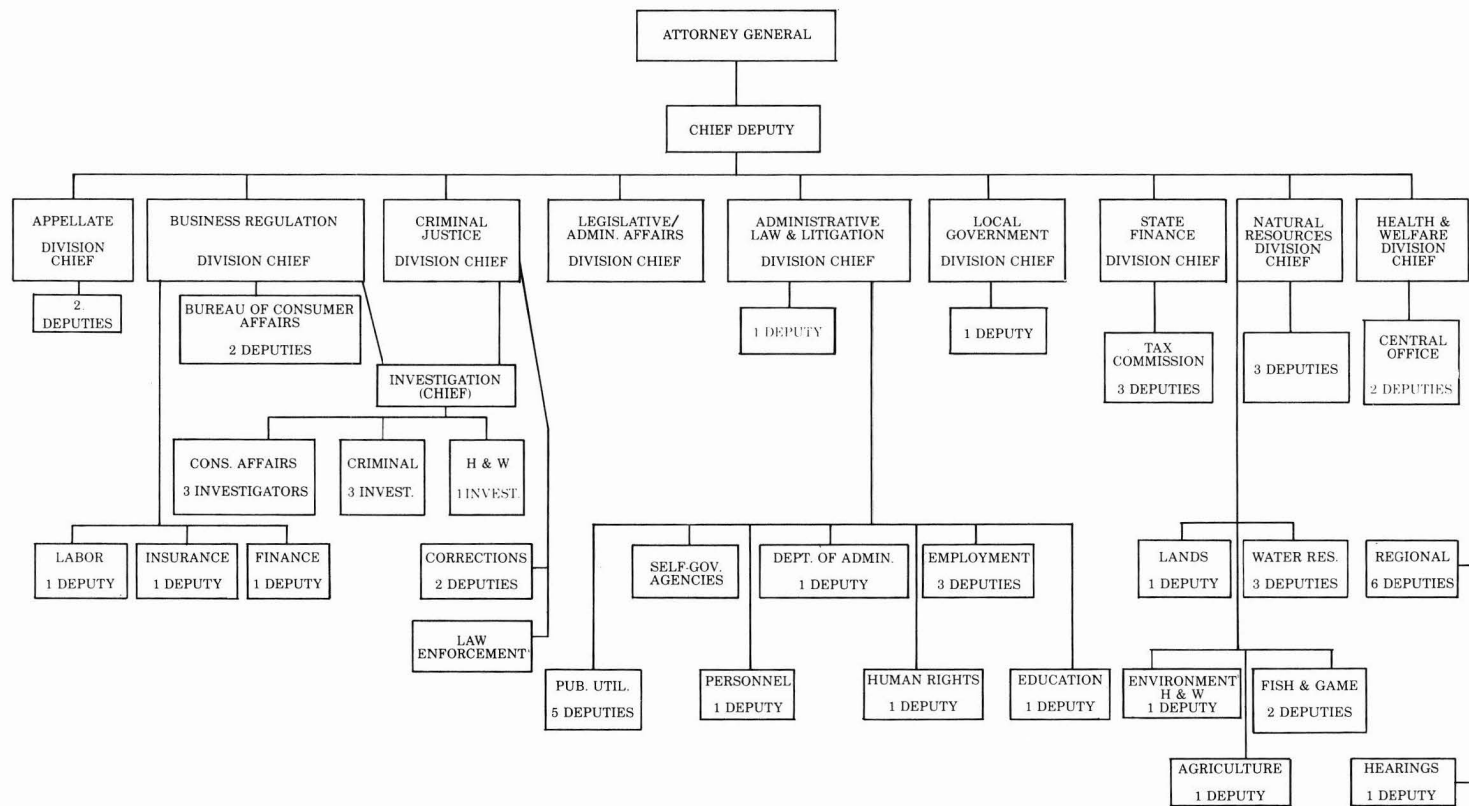
Steve Berenter	Dave High	Dick Russell
Carol Brassey	Jack Hockberger	Robie Russell
Howard Carsman	Dean Kaplan	Cynthia Rutter
Patricia Stephen-	Larry Knudsen	Ted Spangler
Fawcett	W. B. Latta, Jr.	Mike Spink
Warren Felton	Roger Madsen	Myrna Stahman
Robert Gates	LaVar Marsh	Thomas Swinehart
Gavin Gee	Roger Martindale	Becky Thomas
Mike Gilmore	Ken McClure	John Vehlow
Leslie Goddard	John McMahon	Stan Voyles
Steve Goddard	Steve Parry	Jim Weaver
C. Fred Goodenough	Sam Petrillo	Jim Wickham
Jeanne Goodenough	Phillip J. Rassier	Scott Wolfley
Lloyd Haight	Mark Riddoch	Dave Wyncoop

Legal Interns

Rockne Lammers
John Stegner
Candy Wagahoff

Non-Legal Personnel

Karen Allport	Larry Grossman	Olivia Monson
Lora T. Boone	Jan Inglestrom	Sigrid Obenchain
Judith Burton	Robert Jackson	Sandra Rich
Allen Cerialle	Richard LeGall	David Spurling
Neal Custer	Teresa Lemmon	Neysa Tuttle
Mary Freece	Warner Mills	Stephanie Wible



DAVID H. LEROY
ATTORNEY GENERAL

LEGISLATIVE/ADMINISTRATIVE/AFFAIRS DIVISION

Roy Eiguren, Division Chief (1/1/79-6/13/81)

Kenneth R. McClure, Division Chief (6/14/81-)

GOAL I: ACCOMPLISHED

"To continue to improve legislative session procedures and policies and expand immediate access research library."

During FY'81 this division provided thoroughly researched and well-reasoned legal guidance to the Idaho Legislature. With little exception all inquiries were answered in writing by a member of the attorney general's staff within the self-imposed 10-day limit. During the regular session, in addition to the issuance of 2 formal opinions, 38 legal guidelines were written, 30 formal letters, 6 committee appearances for official testimony were made, 3 bills were drafted and 51 follow-up phone calls from legislators wanting oral explanations were handled.

Largely, our policy of writing legal guidelines on all matters of legal assistance was met. While this office sent out almost as many informal letters as legal guidelines, most questions asked did not merit a legal guideline.

Included in this first goal was expansion of our immediate library. This has been extremely difficult. The cost of keeping our present books current has increased dramatically, leaving fewer dollars for expansion than were anticipated. However, we were able to make small, but extremely useful, purchases for this division, as well as for the natural resources, appellate and criminal divisions.

GOAL II: ACCOMPLISHED

"To develop a complete attorney general legislative package by early November, annually, to permit full, early, effective presentation during the session."

Eight pieces of legislation were developed and ready for presentation to the first regular session of the Forty-Sixth Legislature prior to the time that they convened. Those eight draft proposals and the final action are as follows:

1. Consolidation/Vetoed
2. AG Litigation Fund/Withdrawn
3. Investigative Demand/Held, House Jud.
4. Loan Broker/Law
5. Juvenile Waiver/Law
6. Comprehensive Theft/Law
7. Uniform Parole Standards/Withdrawn
8. Enhanced Penalty/Law

GOAL III: PARTIALLY ACCOMPLISHED

"To continue informal consolidation activities with all agencies and departments and design a 1981 bill acceptable to the executive branch."

Informal agreements were signed with all departments not covered by statute with the exception of law enforcement. The "blanket" appointment was

withdrawn and currently all cases handled by law enforcement attorneys are assigned on a case-by-case basis and with special deputy appointments filed at the time litigation is assigned.

Once again this office worked with the executive branch to design an acceptable consolidation bill. However, it appears no bill, in any form, is acceptable to the present governor. Even though the 1981 bill (HB 183) was modified to address the objections raised by the governor in 1980, it was again vetoed after overwhelming support in both houses.

GOAL IV: PARTIALLY ACCOMPLISHED

"To issue the Attorney General Opinion Book and Reports by August 15."

This division was unable to obtain all portions of the biennial report to be included in the opinion book prior to our goal of August 15th. Therefore, this division took over the responsibility of the report and had a volume printed containing the 1979 opinions with the biennial report for the period from July 1, 1978 to June 30, 1980. We further prepared and had printed the volume containing 1980 opinions in the spring of 1981.

GOAL V: ACCOMPLISHED

"To achieve central office on-line computer terminal retrieval and input, in conjunction with legislative support services, of *Idaho Code* and Idaho Attorney General Opinions by 1982."

After several meetings with Supreme Court programmers and Burroughs Corporation technology experts, we were able to install, just prior to the end of FY'81, a terminal which is tied into the Supreme Court's computer. The first system to be completed is the Attorney General Information System (AGIS) which is a court litigation tracking system. Implementation of our short-term goal is complete, the mechanics are in place and we have entered all cases filed since the last biennial report of June 30, 1980, and are keeping up with new cases as they are filed. Fund availability will determine the timing of the next step in the system.

GOAL VI: ACCOMPLISHED

"To update the Office Manual of Policy and Procedure on a continuing basis."

The Idaho Attorney General's Handbook of Policies and Procedure was updated to reflect current procedures for CLE and travel requests and proper dating of formal opinions. A second printing incorporating these changes was published in November, 1980.

GOAL VII: ACCOMPLISHED

"To research and prepare necessary legal background with State Finance (Elections) Division to advise 1981 Legislature and Secretary of State on reapportionment questions."

A major document explaining the history and rationale of reapportionment case law was prepared to accomplish this goal. Special emphasis was placed on

current requirements and guidelines for enacting a valid reapportionment plan. This document was printed and mailed to all legislators in June to prepare them for the July special session.

GOAL VIII: ACCOMPLISHED

“To move diligently through the courts the Idaho Legislature’s constitutional test case on the amending process.”

The Idaho Legislature’s constitutional test case was pursued with vigor. Argument was held on a cross-motion for summary judgment and motions to dismiss in the U.S. District Court for Idaho, May 13 and 14. Judge Callister has the case under advisement. Strategy has already been planned to appeal the district court’s decision should we lose on one or more points.

APPELLATE DIVISION Lynn Thomas, Division Chief

GOAL I: ACCOMPLISHED

“Achieve ‘current and up-to-date status’ on 100% of criminal appellate case load by use of additional personnel, greater in-house deputy referral, and improved time management techniques, thus eliminating extension requests while maintaining established high standards of excellence in advocacy.”

At the present time, almost all criminal appeals are being handled by members of the Appellate Division. During the first eight months of the fiscal year, only four appeals were assigned outside the division. Nonetheless, no second extension requests have been made during that time, and only thirty-three requests for first extensions have been made (less than half of last year’s total). The fluctuating nature of the case load may make it unrealistic to expect that we will ever be entirely free of extensions. Nonetheless, the improvement has been marked.

GOAL II: ACCOMPLISHED

“Improve central co-ordination and monitoring of state civil appeals by developing a consultation and information system covering major matters in state and federal court.”

It is more difficult to measure the success of our efforts to monitor and coordinate state civil appeals, simply because there are not enough of them (outside the Department of Employment), to provide much data. The Supreme Court is now notifying me of all state civil appeal settings, to facilitate travel coordination. However, there have been only two cases set for argument since last spring, and the court has not traveled anywhere during that time. We are frequently consulted by agency lawyers, and lawyers in other divisions, about appellate matters, and it appears that the system is functioning smoothly.

INVESTIGATIVE DIVISION

Russ Reneau, Division Chief

GOAL I: ACCOMPLISHED

"Improve screening and intake to allow greater proportion of investigator time upon major cases of statewide significance, or complex local government assistance requests."

Since the beginning of this administration, all consumer and criminal investigations have been screened and assigned by the chief investigator. A procedural change in the screening process has been employed in order to accomplish Goal #1. Specifically, marginal cases are now assigned for preliminary review rather than for formal investigation. This process has allowed us to expedite disposition of cases where formal investigation is not necessary.

A review of the cases formally assigned in FY'81 reveals a substantial reduction (approximately 50%) from the number assigned in FY'80. The impact of this reduction has allowed a greater amount of investigator time to be devoted to cases of significant importance.

GOAL II: ACCOMPLISHED

"Undertake and complete a minimum of ten (10) targeted pro-active criminal and consumer investigations of broad dimension in high priority areas, including organized crime."

The majority of formally assigned consumer investigations are pro-active in nature. During FY'81 fifty-eight investigations were assigned. These investigations have focused on business opportunities, employment agencies, liquidation sales, entertainment productions, and a variety of other areas where misrepresentations are being made to consumers. These investigations principally involve pretext contacts and test shops which have become an integral part of consumer investigators' duties.

During this period, nine (9) pro-active criminal investigations were initiated. Three of those cases have culminated in arrests and the two cases which have been adjudicated have produced convictions. Three of the remaining cases are active at this time and two of those cases are expected to produce arrests.

GOAL III: ACCOMPLISHED

"Maintain regular joint staffing contacts with state and federal counterparts and sponsor a joint Organized Crime Seminar with the Department of Law Enforcement for local officers."

Several joint staff meetings were held with the Department of Law Enforcement and less formal contacts with the Department's investigative staff have occurred on a frequent basis. Regular contacts with the FBI, the IRS, and ATF were established and are increasing in frequency due to common interest in a number of investigations.

On July 8, 9, & 10, 1981, an Economic & Organized Crime Seminar was presented jointly by this office and the Department of Law Enforcement. The Seminar was entirely accredited by the POST Council and a number of positive comments about the success of the seminar have been received.

GOAL IV: ACCOMPLISHED

"Increase capability for work with Legislature to improve statutory basis of sophisticated electronic surveillance."

Early in this fiscal year, we acquired some sophisticated electronic surveillance equipment to enable us to utilize the new Communications Security Act. During November of 1980, we had the opportunity to test the new equipment and the statutory basis for its use. A wiretap order was obtained and executed during the course of one pro-active investigation. While only a small amount of significant evidence was gathered as a result of the wiretap, the operation served as a worthwhile learning experience for all involved. We have not, to this point in time, identified any flaws in Title 18, Chapter 67, of the *Idaho Code* on which to base any legislative proposals.

NATURAL RESOURCES DIVISION

Don Olowinski, Division Chief

GOAL I: ACCOMPLISHED

"Maintain and enhance high level of awareness and advocacy where states' rights and citizenship interests are affected by federal policy and practices."

This division has continued to monitor the actions and proposed actions taken by federal agencies and the federal government. Those agencies principally included the Bureau of Land Management, the Forest Service, the Federal Energy Regulatory Commission, and the Environmental Protection Agency. Deputy Attorneys General spoke before such diverse groups as L.A.S.E.R. in Salt Lake City, the University of Idaho, Boise State University, the Idaho Mining Association, Idaho County Property Owners, and the Grangeville League of Women Voters. Through communication with such user groups as the Cattle-men's Association, the Wool Growers' Association, the Idaho Forestry Association, the Idaho Mining Association, and the Idaho Conservation League, as well as with the respective federal agencies and the Idaho congressional delegation, the division had been able to maintain and contribute to the awareness and advocacy of state's rights which are affected by federal policy and practices.

Over 8,000 acres of "lieu lands" were finally transferred to the state. The Attorney General and the Division had a substantial positive impact on this transfer and continue to work for the transfer of the remaining lands.

Amicus briefs were filed or joined in by the division in the following U.S. Supreme Court cases: *U.S. v. Montana* (streambed ownership, state-tribal jurisdiction), *California v. Sierra Club* (extent of Corps of Engineers jurisdiction over state water projects), *Andrus v. Virginia Surface Mining and Reclamation Association* (authority of federal government to regulate mined land reclamation), *U.S. v. Adair* (Indian water rights) and *Parker v. Wallentime* (ground water rights) before the Idaho Supreme Court.

Finally, Deputy Attorneys General have authored numerous Attorney General Opinions, both informal and formal. They have provided advice to the Department of Lands, Department of Parks, Department of Fish and Game,

Division of Environment, and to numerous state legislators. They have also maintained extensive communications with local governments through planning and zoning advice which was transferred to the Local Government Division on March 1, 1981.

GOAL II: ACCOMPLISHED

"Work effectively with the Idaho congressional delegation on resolution of potential conflicts with state stream-bed ownership, Birds of Prey expansion, various wilderness proposals, and Heyburn State Park."

Some of the objectives listed under this heading would seem to fall more properly into a litigation category, e.g., state streambed ownership and Heyburn State Park. We were apparently unsuccessful in obtaining a legislative solution for the Heyburn State Park issue. We were successful in obtaining some revised language concerning streambed ownership in the River of No Return Wilderness Act. State stream-bed ownership is an issue in search of the proper litigation context for assertion. The primary difficulty is that in many contexts state streambed ownership is subservient to the retained federal navigation servitude. Because of this, we may have to urge congressional action if the conflict between the state's interest and the federal interest is significant enough in a particular case. The state ownership issue was raised through authorship of an amicus brief in *U.S. v. Montana* which has been argued before the U.S. Supreme Court.

The Idaho congressional delegation should be well aware of state interest conflicts with the proposed Birds of Prey Expansion. Continued communication will be necessary as legislative action is contemplated. In addition, communication of the state's interest to the new Secretary of Interior would seem to be in order.

Appeals concerning BLM wilderness designations in Owyhee County are proceeding. As a decision is reached on this and other lands proposed as suitable for designation in the BLM's wilderness inventory, further communication with the congressional delegation will be necessary. Given the timing of these matters, resolution may well not occur until after 1981.

In addition to the above matters, the division worked with the congressional delegation regarding the reductions in grazing allocations on BLM land. At least partially through division input, reductions were limited to 10% in any one year by congressional action.

GOAL III: ACCOMPLISHED

"Convene Indian Issues Task Force as appropriate in developing and advising and coordinating state legal policy."

The Indian Law Task chaired by Robie Russell authored an amicus brief representing in twelve states in the Supreme Court case of *Montana v. United States* which was decided in our favor. It has provided briefing and research assistance in the case of *State v. Bybee, et al. (Rapid River cases)*. It has also provided advice and assistance concerning Heyburn State Park, the power of the Sho-Bans to enact comprehensive planning and zoning legislation for non-tribal lands within the reservation boundaries, the jurisdiction of tribes over non-

Indians hunting on non-Indian property within a reservation boundary, the scope of Indian water rights, and child custody problems involving the Coeur d'Alenes.

In 1981 indications are that legal issues concerning the power of the tribes over non-Indians within the reservation boundaries and over resource allocation may arise.

GOAL IV: ACCOMPLISHED

"Assist the department and land board in implementing lawful, modern, practical and effective rules, regulations and enforcement on surface mining, dredge mining, oil and gas exploration, and in setting policy for rules or use impacted by federal studies or practices."

In the past year, dredge mining regulations and river bed leasing regulations have been drafted and adopted. Regulations concerning oil and gas exploration have been drafted, as have regulations for surface mining. I would anticipate that those regulations, in some revised form, will be finalized and adopted in 1981. In regard to surface mining regulations, one might anticipate resistance from the industry since surface mining has operated without regulation to this point.

In addition to the above regulations, Deputy Attorneys General from this division were involved in drafting, revising, or reviewing regulations concerning Idaho water quality standards and waste water treatment, air quality regulations, injection well regulations, radiation control regulations, sewage plant operating and training regulations and a cooperative agreement with the EPA concerning hazardous waste enforcement. Some of those regulations are still pending review and adoption by the Board of Health and Welfare.

Other regulations reviewed and drafted included regulations for bacterial diseases of beans, importation of cattle, brucellosis testing, apple standards, seed lab fees, hops disease control, pseudorabies quarantines, and a re-editing and revision of the Department of Agriculture's entire book of regulations.

GOAL V: ACCOMPLISHED

"Conduct successfully all major natural resource litigation pending or filed on behalf of the state in federal or district court."

Deputy Attorneys General were involved in litigation in numerous matters on behalf of the state. A partial listing of the successes includes:

1. *Heyburn State Park*. United States District Court decision upholding state ownership of the park; currently on remand from the Ninth Circuit to determine if the tribe has standing to appeal.
2. *BRA v. State of Idaho*. Idaho District Court opinion upholding the validity of state air quality regulations; appeal by BRA recently dismissed as moot.
3. *State v. Brassey*. Consent judgment obtained against violator of Idaho's stream channel alteration act.

4. *State v. Cutler*. Conviction of Sho-Ban Indians for illegally taking game on state game preserve. Case currently appealed to Idaho District Court.

5. *State v. Johnson*. Consent judgment obtained against violator of Idaho Dredge Mining Act.

6. *State v. Wadsworth*. Successful prosecution of violator of Idaho Stream Channel Alteration Act.

7. *Idaho Department of Fish and Game v. Allred*. Successful overturning of director's decision allowing trout farm on Billingsley Creek.

8. *Idaho v. Oregon and Washington*. Interim decision from the Supreme Court allowing Idaho's suit to proceed.

9. *In the Matter of George Kirschner*. Settlement of appeal to district court from a decision revoking a business license of a fruit packer for unfair practices.

10. The Division of Environment has obtained consent decrees in a dozen different actions. Significant among these was a decree involving the Union Pacific Railroad and open burning violations; Noranda mines involving cleaning up of tailings piles and monitoring of water quality near its revived mine at Cobalt; and with Potlatch Corporation requiring reduced emission of particulate matters from its plant in Lewiston.

11. The Department of Water Resources has completed three water rights adjudications and has been successful in an appeal to the Federal Energy Regulatory Commission concerning minimum flows from Lucky Peak Reservoir.

12. *State v. Golden Reef*. Injunction and Consent judgments entered against mining company polluting Monument Creek.

As we previously discussed, there are a large volume (over 70) of pending lawsuits primarily enforcing various state and environmental protection laws. Other lawsuits, both successful and unsuccessful at the trial level, are currently on appeal. Aside from the normal uncertainties surrounding litigation, I would see the following potential obstacles for successful completion of these suits: (a) the general "belt tightening" involved with the state budget process may mean that certain preparation procedures such as depositions, travel, and (b) the hiring of expert witnesses may have to be foregone. At this point, no insurmountable difficulties have been encountered, with the possible exception of *Cramer v. State*.

GOAL VI: ACCOMPLISHED

"Continue to coordinate legal activities of all agencies within the division to avoid conflicts and duplication."

Coordination of legal activities of agencies within this division has been successful in avoiding conflicts and duplication. Of special note are the legal activities of the Department of Fish and Game.

The Department of Fish and Game is currently overloaded with work and is operating almost on a crisis management basis. This means that necessary long-

range work for *Idaho v. Oregon and Washington* was somewhat delayed so that more immediate concerns could be handled. As the case proceeds, more and more time will have to be devoted to it. That department could certainly use additional assistance, if only on a temporary basis from now through the summer of '82.

ADMINISTRATIVE LAW & LITIGATION DIVISION

Tom Frost, Division Chief

GOAL I: ACCOMPLISHED

"Expand the support and consultation role of the division among agency counsel on major and complicated cases."

In terms of the support of agency counsel on major and complicated cases, the division's role has increased. By way of example, this division, along with Warren Felton, is handling the *Hutchins/Allgood* case, a controversy arising over the land board's refusal to grant certain mineral leases. Another is *Lindquist v. State Board of Corrections*, a federal action testing the adequacy of the prison library, which this division, along with penitentiary counsel, will be trying the week after next. Still another is *Andersen v. Evans*, a Board of Education suit which will sort out a "special" child's educational rights to an 11-month school program. To the extent a major source of litigation is equivalent to a major litigation, this division has relieved the Bureau of Risk Management of a substantial workload, which because of the rate it pays private firms to handle its claims, results in a major cost saving to the fund.

It is difficult to ascertain whether or not there has been an increase in the counselling aspect of our work. A number of situations can be recalled, namely in the area of administration, education, human rights, and business regulation where the division has been called upon concerning litigation problems. However, another source of consultation requests, the Fish and Game Commission, has notably decreased.

Additionally, the following current notable litigations come to mind:

1. A breach of contract suit challenging Idaho's withdrawal of its employees and dependents from Gem Health, a health maintenance organization. This division will be working with the Department of Administration.
2. A suit has been filed against the governor, the Department of Health and Welfare, and the Department of Education challenging the state's placement of "special children" as not being in the "least restrictive environment" possible under federal requirements. Consultation and exchange of ideas in this suit has been carried on between this division, the Department of Education attorney, and the Health and Welfare legal branch.

3. Another expansion of this division's support role came with the replacement of LaVar Marsh by Carol Brassey. With her assumption of these duties we have expanded our counsel to employment matters more than ever before.
4. Two other sources seeking day-to-day assistance have been the Health & Welfare legal division and the Local Government Division.
5. Lastly, a new source, the Department of Labor and Industrial Services, has generated an increased consultation load simply by its reorganization into this division.

With the present caseload this division is litigating, too much of an increased consultation role might be at the expense of the quality of the existing litigation.

GOAL II: ACCOMPLISHED

"Initiate a review of administrative hearing practices and procedures in Idaho and recommend structure or statutory changes as appropriate.

Much of this kind of review is an on-going thing which occurs simply by reason of the division's participation in a large number of licensure proceedings and the like. Through this activity a number of situations have been noted where an agency follows a wrong or bad practice. These are cured at the time it is noted. Usually these situations occur when the agency does not follow the APA or in some cases even its own rules of procedure. The only major deficiency that has been noted concerning administrative practices has to do with a number of the occupational licensing boards or other self-governing agencies which have not fully adopted rules of practice with respect to their contested cases, rule-making, or declaratory ruling responsibilities. In this connection, the division has prepared legislation for Marv Gregersen, Occupational Licensing Bureau, whereby his Bureau can promulgate rules of practice and procedure which will apply to matters before any of the boards and commissions which are connected with his Bureau.

On the subject of statutory amendments, this division has been reluctant to tamper with the substantive provisions of the APA, which is actually in a model state act, so as not to take away its "uniformity" and the consequent precedential value.

Legislation allowing the Bureau of Occupational Licenses to draft a uniform set of regulations relative to the agencies in that category did not get passed at the last session of the legislature. The same result is being accomplished, however, by drafting a uniform set of rules, and having each and every agency adopt the same.

We are also presently reviewing and studying an amendment to the APA which would accord persons a hearing before the licensing agency on

a *denial* of a license, as opposed to a revocation of a license. This would almost certainly result in an increased hearing load, and before it is recommended to the legislature, other states which have the same are being watched to estimate the increased load in terms of time, attorney time, and expense.

Another area concerning licensing boards which needs refinement is the grounds for revocation known as "unprofessional conduct", "unethical conduct", etc. According to the Idaho Supreme Court cases that we have read on the subject, these terms require definition in order to be effective. The boards that would be affected are dentistry, pharmacy, architecture, and psychology.

Achievement in the finalizing of agreements between the licensing boards and the Bureau of Occupational Licensing (required by law since the late 1960's). Other improvements with respect to the APA system might be a listing of available "qualified" hearing officers throughout the state, for the purpose of allowing the various agencies to use the services of a local competent hearing officer at the least amount of expense.

GOAL III: ACCOMPLISHED

"Develop criteria and systems for the handling of matters referred by those self-governing agencies which have retained private counsel."

Over the past year, the only cases which come to mind where agencies represented by private counsel have enlisted our services involved the Board of Engineering and the Board of Dentistry. In the case of the Engineering Board, its private counsel had a conflict in respect to a prospective license forfeiture, and observed the proper protocol of obtaining approval from the Attorney General before referring the case. This division is not aware of what criteria was employed by the Attorney General in accepting the case. The other, the Board of Dentistry, was accepted for a minor injunction proceeding through central office efforts, because the board was out of funds and could not pay its private counsel to prosecute the case. While working on that matter, the board's executive secretary enlisted our services in respect to a dentist who appeared to be prescribing a large amount of drugs for himself and his family, and just recently has indicated that it would like this division to do all of its work. This request, as with others by some of the commodity commissions, is being studied by Larry Harvey and this division. On an unofficial basis, some of the things that were looked at and believed to be important in connection with a decision on these requests have been:

1. The specific statutory obligation of this office to represent the agency involved;
2. The extent to which the board or commission performs a public purpose normally incident to the main government, as opposed to a more narrow purpose of benefitting its membership, i.e., commodity commissions;

3. The reason the matter is being referred to our office, i.e., conflicts, shortage of funds;
4. The importance of the case with respect to precedent and value;
5. The nature of the matter referred in terms of its other legal work, i.e., private counsel doing the important work and sluffing off the non-important collections, etc., to our office;
6. The nature of the time and cost involved in taking the matter, measured in terms of our work, and;
7. The ability of that agency to pay and absorb the costs that will be incurred in handling the matter.

The decisional process is broader and more complicated than the above criteria would indicate, because, like Topsy, a confusing agency framework has grown over the years. There are a number of boards and commissions whose substantive legislation authorizes attorney general representation. A number of boards and commissions may be eligible for attorney general services simply by reason of their attachment to the Bureau of Occupational Licenses, which bureau we are statutorily assigned to represent. Lastly, there are a number of boards which, although arguably entitled to the attorney general's services, are represented by private counsel on a Special Deputy Attorney General basis, or other procedure. Presently, Larry Harvey, Ken McClure, and I are attempting to sort out the basis on which these agencies will be accorded our services, and whether or not it should be charged on an inter-account payment basis.

Recently we have had overtures from three agencies relative to assistance from our office and substitution for their retaining private counsel. The first, the Idaho Beef Council, after consultation with Larry Harvey, was rejected simply because its private objectives overwhelmed its government attributes. The second, the Board of Dentistry, was denied direct assistance by this office, except to the extent that a portion of their cases would fall into the drug or pharmacy areas. The third, the Board of Nursing, who asked for a fee or sum to be stated for representation, was advised that the office would not be interested in such a part-time situation upon the decision of the Attorney General. One of the problems with such a part-time practice is the difficulty in charging and using funds received from the agency to hire legal assistance.

GOAL IV: NOT ACCOMPLISHED

"Develop an in-house budget covering the work of the division to eliminate the necessity of relying exclusively on agency budgets or special funds."

Simply by reason of the fact that there has not been a sufficient history of what cases we will be handling from what agencies, and in particu-

lar because of the unsettled situation concerning the minor boards and commissions, no realistic effort has been made to predict and develop a budget for this purpose. The first problem that must be solved in respect to such a budget is a fix on what agencies this division will be representing, and the financial arrangement in connection with such representation. Secondly, and perhaps the most important in connection with such a budget, is the outcome of future offerings of the attorney general consolidation bill.

LOCAL GOVERNMENT DIVISION

Michael Moore, Division Chief (1/1/79-2/28/81)

Robie Russell, Division Chief (3/1/81-)

GOAL I: ACCOMPLISHED

"Maintain high accessibility under appropriate guidelines of division to local officials upon request, but commence screening and format selection that results in greater concentration of senior attorney time on major, developing issues."

The division continues to respond to all inquiries by the legislature and local public officials on a broad range of topics, after appropriate consultation with local legal counsel. Due to a change in personnel and a corresponding change in duties, it may be inappropriate for a few months to make any attempt to excessively "screen issues" for the senior attorney. Division of labor is accomplished by directing all city matters and planning and zoning to one attorney and all county and special district matters to the other. Overlaps are handled on a case-by-case basis.

The division has also assumed responsibility for local planning matters, formerly headed by Natural Resources, also chairs the Indian Law Task Force, and serves as Disaster Coordinator for this office.

GOAL II: ACCOMPLISHED

"Encourage work by legislature and the tax commission to properly integrate tax or spending limitation concepts into surrounding regulations and statutes to avoid both litigation and loopholes via the 1% Task Force."

A major portion of the concerns addressed by this goal were solved by the passage of HB 398, 1981. The 1% Task Force continues to meet, but the issues do not have the same urgency they once possessed.

GOAL III: NOT ACCOMPLISHED

"Increase trial participation emphasis in selected state or local assistance lawsuits to shape or define or refine municipal corporation law in the public interest."

This goal is extremely difficult to achieve for several reasons, the primary one being the hierarchy of litigation in this state. By the time this office becomes aware (if ever) of any proceedings, the issues are already clarified and a majority of the work is done. Until a better system of reporting is on line, we will continue to have difficulty in completely fulfilling this goal.

However, we are participating in several key areas, including Idaho Supreme Court appeals regarding the Local Planning Act and district court cases including *V-1 Oil*, Indian matters and *Hutchins/Allgood*. We also offer advice and briefing when asked on matters before the district courts.

GOAL IV: ACCOMPLISHED

"Continue preventative law and educational activity emphasis by seminar, newsletter, speaking activity."

This goal is continuing to be met by our newsletter which informs local government attorneys of the latest developments in our area of the law; by staff participation as speakers in seminars and other educational programs for local governments; and by our informal advice given on a wide variety of issues.

GOAL V: ACCOMPLISHED

"Complete an historical analysis of the development and structure of Idaho's taxation system to date as a basis for possible future adjustments."

A substantial portion of this was accomplished by Mike Moore through a memorandum addressed to the attorney general. However, we should continue to work on local taxation in conjunction with the legislative study on local taxation.

STATE FINANCE DIVISION

John Sutton, Division Chief

GOAL I: ACCOMPLISHED

"Acquire in-house expertise and develop more sophisticated review procedures in municipal bond issuance."

During FY'81 a member of this division attended a Practising Law Institute seminar on municipal bonds. This seminar provided the scope of review and procedures which enables the attorney general's office to lead the area of expertise in municipal bonds among governmental entities in

Idaho. This division has continued to review all housing authority bonds issued in Idaho and has developed a close professional working relationship with regional counsel of the Department of Housing and Urban Development. We continue to advise the superintendent of education on the issuance of financing and refinancing of local school district bonds. Our office has worked closely with the University of Idaho, Idaho State University and Boise State University by reviewing and lending requested assistance in issuing their general obligation and building revenue bonds.

We anticipate continuing to develop expertise in governmental bonds and to provide any requested assistance in this area.

GOAL II: ACCOMPLISHED

"Continue effective, efficient advice to the treasurer, auditor, secretary of state and board of examiners and oversee proper and lawful implementation of state regulations on travel, moving and deferred compensation."

During FY'81 the State Finance Division provided legal counsel to the state treasurer. This division assisted the secretary of state in review, analysis and enforcement of the "sunshine" law, the registering and accounting of political lobbyists, the implementation and construction of this state's corporate and election laws.

This division also furnished legal counsel to the state auditor and assisted in such matters as collections, garnishments, computer management, implementation of the bi-weekly payroll, and processing of board of examiners' decisions.

In FY'81 this division provided legal counsel to the board of examiners and was chairman of that board's moving and travel regulations subcommittee. In this capacity, legal research and analysis was given concerning pending claims before the board. This division lent assistance in researching the board's eventual 3.85% holdback of legislative appropriations, and handled various assignments delegated by the board of examiners.

In addition, this division has provided legal counsel to the retirement board and the department of retirement. In this capacity it has represented the department of retirement in effecting the exit of Power County from the state system; assisted in implementing new legislation; represented the department in personnel matters, collection proceedings, attempted attachments, and benefit disputes.

This division has rendered numerous legal opinions from construing the Idaho Open Meeting Law to approval of interstate compact agreements.

The State Finance Division also represents the attorney general on the deferred compensation subcommittee of the board of examiners. In that capacity this division, in conjunction with the other two members, oversees the implementation of the deferred compensation program for the State of Idaho and with total monthly and bi-weekly investments exceeding two million dollars.

As legal counsel this division has counseled that committee in construing service contracts with the present four carriers; reviewing hardship requests; the tax consequences of deferments; personnel matters; administrative guidelines and deadlines and preserving the integrity of the State of Idaho's deferred compensation program.

During FY'81 this division provided assistance to the Idaho Legislature in matters ranging from "residency" requirements to constitutional initiatives.

GOAL III: NOT ACCOMPLISHED

"Prepare a new and updated handbook for the board of examiners."

During FY'81 the State Finance Division has compiled all updates to the relevant statutes affecting the board's handbook. It is anticipated the new handbook will be completed after the beginning of the new fiscal year.

GOAL IV: ACCOMPLISHED

"Research and prepare necessary legal background in conjunction with Legislative Affairs Division to advise the 1981 legislature and secretary of state on reapportionment questions."

The State Finance Division met with legislative leadership on several occasions and provided all requested information. The Legislative Affairs Division handled primary responsibility in this area and issued a memorandum on this subject, as detailed above.

As this matter continues unresolved, the State Finance Division remains available to lend any requested assistance future circumstances warrant.

BUSINESS REGULATIONS DIVISION

J. Michael Brassey, Division Chief

GOAL I: NOT ACCOMPLISHED

"Further improve consumer protection enforcement by increased monitoring of Assurance of Voluntary Compliance subjects, executing a minimum of two targeted industry investigations, and completion of a divisional policy and procedure manual."

The division has filed one lawsuit as a result of the monitoring of Assurances of Voluntary Compliance (against Jerry Armstrong d/b/a/ Compact of Idaho) and has reviewed two other assurances with a view toward litigation (Roy Smith d/b/a/ R&S Builders and Family Fitness Center of Boise, Inc.). The division has not carried out targeted investigations nor has it completed the divisional policy and procedure manual. The cut in funding for the division's consumer protection activities has prevented the division from targeting industry investigations or completing the divisional policy and procedure manual. Such work as has been done with regard to the manual will be stored with the division's other records after July 1 so that the manual could be completed if funding is renewed for consumer protection functions.

GOAL II: PARTIALLY ACCOMPLISHED

"Develop a comprehensive policy for the enforcement of state anti-trust laws and participate with the Idaho Law Foundation in developing a proposed statutory revision."

Preliminary work has been done on the comprehensive policy for the enforcement of the state's antitrust laws. Two lawsuits were initiated, however, the legislature's failure to allocate appropriations for this division has prevented completion of this program.

GOAL III: ACCOMPLISHED

"Design a review program for charitable trusts and foundations, and implement initial stages thereof."

The review program for charitable trusts and foundations has just been completed. We will continue and complete the actual case file reviews by the end of the calendar year.

Charitable trusts continue to be monitored. Each charitable trust is reviewed at least once a year, and trusts which develop difficulties are reviewed on a need basis.

GOAL IV: NOT ACCOMPLISHED

"Expand state client services by presentation of a new legislation seminar to agency directors and staff."

An absence of legislative appropriation has prevented completion of this program. However, this client service will continue to be provided as availability of personnel permits.

If you have further questions concerning the status of the division's objectives, I will be pleased to discuss them with you at your convenience.

CRIMINAL JUSTICE DIVISION

Mike Kennedy, Division Chief

GOAL I: ACCOMPLISHED

"Design of a uniform statewide repeat offender policy and recommendation of adoption by local prosecutors."

This goal was accomplished legislatively, with the full support and cooperation of the Idaho Prosecuting Attorney's Association. Idaho's first mandatory minimum sentencing statute, *Idaho Code* §19-2520A was fully complemented by the addition of three statutes, to wit: *Idaho Code* §§19-2520B, 19-2520C, and 19-2520D. These statutes now provide a comprehensive coverage of mandatory minimum sentencing for repeat and first time offenders when the commission of the crime was committed with the use of a firearm, accompanied by the infliction of great bodily injury, or amounts to a repeated sex offense, extortion or kidnapping.

GOAL II: ACCOMPLISHED

"Advocacy before the legislature of (1) comprehensive theft statute, (2) revised incarceration, probation, sentencing and parole policies and procedures as acceptable to the board of corrections, (3) insanity defense elimination or modification, and (4) other topics to be identified."

1. *Comprehensive Theft Statute:*

House Bill 282, Idaho's Comprehensive Theft Statute, passed both the house and senate and was signed by the governor on March 31, 1981 at 4:40 p.m. The comprehensive theft statute arrived at legal efficacy on July 1, 1981 and is codified in *Idaho Code* §§18-2401 et seq. Before the effective date of the comprehensive theft statute, the division chief prepared and distributed to all of the prosecuting attorneys a manual entitled "Prosecution Under Idaho's Theft Consolidation Statute". Additionally, one lecture on the subject has been given to the Idaho Prosecuting Attorneys Association, one lecture has been given to a peace officers' seminar, two more lectures are scheduled to be given on September 17, 1981 at the POST academy, and a law review article on the subject is scheduled for the University of Idaho Law Review.

2. *Revised incarceration, probation, sentencing and parole policies and procedures as acceptable to the board of corrections:*

Due to the prison riot of July 23, 1980 (22 days after the adoption of the goals and objectives stated herein) the energies of the department of corrections were directed to rebuilding the prison. This effort included a complete reconstruction of many aspects of the prison, to wit: living units, correctional industries, the hospital, and many other of the damaged facilities. Additionally, over one-half of all of the inmates at the department of corrections were transferred out of state and gradually returned with only one major incident.

In spite of the riot itself and the resulting administrative and legal after effects, the department completely rewrote its disciplinary rules, custody classification rules, and rules governing inmates in maximum custody. These rules were rewritten to bring them up to various constitutional standards based upon a model prepared by the American Correctional Association. Moreover, the department of corrections changed its classification and custody system in accordance with the recommendation of the governor's committee and task force that was assembled in response to the July 23rd prison riot.

The department of corrections either participated in or sponsored the following significant statutory changes: (1) *Idaho Code* §20-101C: A statutory amendment relating to furlough conditions to bring them in compliance with the requirements and procedures of a work center; (2) *Idaho Code* §20-413 allows the department of corrections to contract with other state and federal penal institutions and with out-of-state governmental entities for the production, manufacture, exchange, sale, or purchase of goods; (3) *Idaho Code* §67-5303 exempts correctional industry's employees from the Idaho personnel system and allows correctional industries to contract to sell goods to the public.

3. *Insanity defense elimination or modification:*

Due to the fact that the Department of Health and Welfare was intensively studying and pursuing this issue, the matter was not pursued during the 1981 legislative session. However, such an effort is presently slated for the ad hoc legislative committee for a 1982 legislative effort.

GOAL III: NOT ACCOMPLISHED

"Design a model victim restitution system for Idaho localities and encouragement for its implementation."

Although materials and model programs relating to this goal were requested and received from the National District Attorney's Association, no aspect of this goal was achieved due to staff limitations.

GOAL IV: ACCOMPLISHED

"Joint conduct with the Department of Law Enforcement of an Organized Crime Seminar for local authorities."

This goal was accomplished in conjunction with the investigative division's Goal No. 3. The Attorney General's Office sponsored an "Economic and Organized Crime Seminar" at the POST facility from July 8 through July 10, 1981. The criminal justice division chief, as well as two criminal investigators with the Attorney General's Office were speakers at the seminar.

GOAL V: ACCOMPLISHED

"Maintain and even enhance excellent attorney general-prosecutor relations currently existing."

In addition to constant prosecutorial assistance through correspondence and telephonic communications, the criminal justice division has regular input on the IPAA Newsletter. Moreover, the division chief has been a regular speaker at the IPAA seminars.

The division chief authored Idaho's first comprehensive extradition manual entitled "Idaho Extradition Manual". The manual was distributed to all prosecuting attorneys in June of 1981. Additionally, the division chief authored and distributed to all prosecuting attorneys in the state a manual entitled "Prosecution Under Idaho's Theft Consolidation Statute".

HEALTH & WELFARE DIVISION

Mike Johnson, Division Chief

GOAL I: ACCOMPLISHED

"Reorganize staff deployment and increase production consistent with departmental or budget limitations and needs, including placing in service one additional attorney in the Idaho Falls-Pocatello region."

Reorganization of staff deployment was accomplished by bringing to the central office one of the two attorney positions in the Coeur d'Alene office for regions I and II and the single attorney position in the Nampa office for regions III and IV. This reorganization has proven beneficial to this division by providing a more logical and definitive parcelling out of workload. In the case of moving the second position from the Coeur d'Alene office for regions I and II to the central office, this attorney is able to work more closely with the community rehabilitation administrators.

The addition of a second environmental attorney has made it possible to spend an equal amount of time representing the division of environment and the division of health. The division of health has been in need of their own legal counsel for some time and this arrangement has been working quite satisfactorily.

While placing in service an additional attorney in the Idaho Falls/Pocatello region has not been able to be done because of financial considerations, this remains a desirable objective and has been somewhat accomplished by central offices services provided directly to major institutions in the region.

GOAL II: ACCOMPLISHED

"Continue refinement of division and regional work priorities and increase effectiveness and uniformity of county prosecutor work relationships."

Refinement of division and regional work priorities has improved in that a new attorney time-keeping system has been instituted to further break down the attorneys' work day into the various program-related activities beyond those breakdowns required by the administrative division. In addition to enabling us to keep closer track of the type of work performed, this new system enables the agency's division of internal control to more accurately bill the federal fund sharing program and results in considerable savings to the agency. The county prosecutor work relationships are under constant review, particularly in the area of support enforcement, where our attorney, Dean Kaplan, is reorganizing the legal representation in this area and working closely with the county prosecutors in doing so.

GOAL III: ACCOMPLISHED

"Utilize the Nuclear Waste Task Force in developing and coordinating and advising proper state legal policy on injection disposal and storage issues at INEL."

The Attorney General's Nuclear Waste Task Force was formed in response to charges in 1979 and 1980 that INEL was injecting dangerous quantities of radio-active wastewater in the Snake River aquifer. This issue was resolved in an acceptable, if inconclusive manner when INEL agreed to study alternatives to its injection disposal method. An engineering study was completed and INEL has been considering the various options presented. The Attorney General's Office, together with the Western Conference of Attorneys General and a legislative group sponsored a July, 1981, seminar on "Low Level Nuclear Waste" in Sun Valley which drew national experts and attendees.

GOAL IV: ACCOMPLISHED

"Place a greater emphasis on formal research and written response replies to major issue departmental inquiries."

The division has placed a much greater emphasis on formal research and written response replies to major issue departmental inquiries. The workload has been reorganized in this area as follows:

- (a) With the hiring of Jim Wickham to support the community rehabilitation division, that division's inquiries are now given a much higher priority than in the past, and Jim considers his role to consist in large part of responding to the need of the division in the area of legal problem solving.

- (b) Larry Knudsen's direct representation of health also has shown immediate and direct benefit.
- (c) As for other departmental inquiries, we have established a new policy of the division chief handling most of these personally, putting greater emphasis not only on the formality of a written response, but also on a speedier reply.

NEW CASES OPENED FOR COURT LITIGATION

The Office of the Attorney General has opened the following cases:

CASE NAME	TYPE OF ACTION	STATUS
Marjorie Moon vs. State Board of Examiners	AL/Miscellaneous	Pending
In the interest of: Sheila Phillips	HW/Child Protection	Closed
Grand Canyon Dories vs. Outfitters & Guide Board	NR/Miscellaneous	Pending
State vs. Harold Krepp	AP/Miscellaneous	Pending
State vs. Jesse Scroggie	AP/Miscellaneous	Pending
Leroy Kary vs. Nick Chenoweth	AL/Miscellaneous	Closed
Kathy Logue vs. Ricky Logue	HW/Miscellaneous	Pending
Borders and SOI vs. Borders	HW/Miscellaneous	Closed
State vs. Joe Yates	AL/Wage Collection	Pending
State vs. Steven Clark	AL/Wage Collection	Closed
Strate and SOI vs. Darrell Goodnight	HW/Miscellaneous	Closed
SOI/Rumple vs. Morrison	HW/Miscellaneous	Closed
In the interest of: Anna Marie Johnson	HW/Child Protection	Pending
State vs. Linda Jean Jackson	HW/Miscellaneous	Closed
SOI/Holcomb vs. Perry Wagoner	HW/Miscellaneous	Closed
State vs. Roxy Miller	HW/Miscellaneous	Closed
In the interest of: Randy McArthur	HW/Miscellaneous	Closed
SOI/Bunn vs. Curtis Graham	HW/Miscellaneous	Pending
SOI/Barbot vs. Bradshaw	HW/Miscellaneous	Closed
SOI/Bosted vs. Rick Cain	HW/Miscellaneous	Closed
SOI/Gregoria vs. Vergel	HW/Miscellaneous	Closed
SOI/Reichardt vs. Lauren Day	HW/Miscellaneous	Pending
Melander vs. Melander	HW/Miscellaneous	Closed
In the Estate of: Frank Hing Wong	AL/Miscellaneous	Pending
In the interest of: Carlson Children	HW/Miscellaneous	Closed
Raymond Wells vs. State	CJ/Corrections	Closed
Moon vs. Dep. of Lands	NR/Lands	Pending
State vs. Treasure Valley Safety	AL/Wage Collection	Closed
Nord and Bloesch vs. Unknown Claimants	NR/Water Resources	Pending
State vs. John Light	AP/Miscellaneous	Closed

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State vs. Sharon Mauch	AP/Miscellaneous	Closed
State vs. Jose Lopez	AP/Miscellaneous	Pending
State vs. David Thompson	AP/Miscellaneous	Pending
State vs. Robert Greensweig	AP/Miscellaneous	Pending
Melvin McCabe vs. State	AP/Miscellaneous	Closed
Ardell Schmidt vs. State	AP/Miscellaneous	Pending
State vs. William Nice	AP/Miscellaneous	Pending
State vs. Fred Hendren	AP/Miscellaneous	Closed
State vs. Mike Derickson and Assoc.	AL/Wage Collection	Pending
State vs. Mike Derickson and Assoc.	AL/Wage Collection	Pending
State vs. Rick Farrell	AL/Wage Collection	Closed
State vs. Wilbur Flagel	AL/Wage Collection	Pending
Helene Hunt vs. Virginia Balser	AL/Miscellaneous	Pending
Investigation of: Valley & Assoc.	BR/Consumer Protection	Closed
State vs. Walter Bush	BR/Consumer Protection	Pending
State vs. Eugenie Skelton	AL/Wage Collection	Closed
State vs. Eugene McCoy	CJ/Miscellaneous	Closed
State vs. Vaughn Bybee et al./ Rapid River	NR/Fish & Game	Pending
In the interest of: Vickie Buchanan	HW/Miscellaneous	Closed
State vs. Peter Wielkiewicz	AP/Miscellaneous	Pending
State vs. Monte Dryden	AP/Miscellaneous	Closed
James Miller vs. Tom Frost	AL/Miscellaneous	Closed
In the interest of: McQueen Children	HW/Child Protection	Closed
Wahoo and Bha, Inc. vs. State	NR/Water Resources	Pending
In the interest of: Christian & Candace Newman	HW/Miscellaneous	Closed
State vs. Lawrence Ramage	HW/Miscellaneous	Closed
Paul Reiss vs. Jim Harris	AP/Miscellaneous	Pending
State vs. John & Emilie Pound	AL/Wage Collection	Closed
State vs. Treasure Valley Safety	AL/Wage Collection	Closed
State vs. Larry Leas	AL/Wage Collection	Closed
In the interest of: James & Jeff Bragg	HW/Miscellaneous	Closed
State vs. Paul Calabretta	HW/Miscellaneous	Pending
D. Jeff vs. John Evans	HW/Miscellaneous	Pending
Howell & Yates vs. State	CJ/Corrections	Closed
State vs. Juan Renden	HW/Miscellaneous	Pending
State vs. Oliver Mousseau	HW/Miscellaneous	Closed
Thomas vs. Thomas	HW/Miscellaneous	Pending
SOI/Dallas vs. Dallas	HW/Miscellaneous	Closed
In the interest of: Tim & Mark Harper	HW/Child Protection	Closed
State vs. Orchard Corp.	AL/Wage Collection	Pending
State vs. Geological Consulting	AL/Wage Collection	Pending
State vs. Buehler's Sportsman	AL/Wage Collection	Closed
State vs. Buehler's Sportsman	AL/Wage Collection	Closed
State vs. Alan Neumann	HW/Miscellaneous	Pending
Dan Goodrick vs. State	CJ/Corrections	Closed
In the interest of: Baby Girl Miller	HW/Miscellaneous	Closed

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Worl vs. State	HW/Miscellaneous	Closed
State vs. James & Irene Seidler	HW/Miscellaneous	Pending
Paul McPherson vs. State	CJ/Corrections	Closed
State vs. Robert & Joyce Schuler	HW/Miscellaneous	Pending
In the interest of: Hassiss	HW/Miscellaneous	Closed
Bank of Idaho vs. City of Hailey	LG/Local Planning	Pending
Nancy Funke vs. State	HW/Miscellaneous	Pending
Charles Izatt vs. State	CJ/Corrections	Closed
William Alley vs. Crowl	CJ/Corrections	Pending
SOI/Yeend vs. Tracy Maravilla	HW/Miscellaneous	Closed
In the interest of: Baby Boy Weiser	HW/Terminations	Closed
State vs. Clyde & Janet Watson	AL/Wage Collection	Closed
State vs. Steven White	AL/Wage Collection	Closed
State vs. Mel Jenkins	AL/Wage Collection	Pending
In the interest of: Ryan Children	HW/Child Protection	Closed
St. Alphonsus Hospital vs. Elmore Cnty.	HW/Miscellaneous	Pending
State vs. John Packer	AL/Wage Collection	Pending
State vs. Scott Jensen	AL/Wage Collection	Pending
State vs. Roy Ivey	AL/Wage Collection	Closed
State vs. Morgan David Lee	AL/Wage Collection	Pending
State vs. Al Watts	AL/Wage Collection	Pending
State vs. Wagner's	AL/Wage Collection	Closed
Susan Lepo vs. Richard Christmann	HW/Miscellaneous	Closed
Leyvas vs. Milt Klein	HW/Miscellaneous	Closed
State vs. Jerry Morris	CJ/Miscellaneous	Closed
State vs. Jay Wadsworth	NR/Water Resources	Pending
Ann P. Leyvas vs. Milton Klein	HW/Miscellaneous	Pending
In the interest of: Scott Olmsted	HW/Child Protection	Closed
Tanya Hinckley vs. State	HW/Miscellaneous	Pending
State vs. Ron Weise	HW/Miscellaneous	Pending
State vs. Lewis Clark Motor Co.	AL/Wage Collection	Closed
State vs. Mike Krall	AL/Wage Collection	Pending
In the interest of: Forster Children	HW/Miscellaneous	Pending
Francis Palmer vs. State	CJ/Corrections	Closed
Hill vs. Gilbo	HW/Miscellaneous	Closed
SOI/Hollen vs. Kevin Norby	HW/Miscellaneous	Closed
Christensen vs. All Claimants	NR/Water Resources	Pending
Crow vs. Gordon	NR/Water Resources	Pending
State vs. Ernest Maruca	HW/Miscellaneous	Closed
In the interest of: Johnson Children	HW/Child Protection	Closed
State vs. Ute Friedley	HW/Miscellaneous	Pending
State vs. Fore and Aft	AL/Wage Collection	Closed
State vs. Sahara Design	AL/Wage Collection	Pending
State vs. Boise Cab	AL/Wage Collection	Pending
State vs. Al Watts	AL/Wage Collection	Pending
State vs. Mike Krall	AL/Wage Collection	Pending
In the interest of: Garcia Children	HW/Child Protection	Closed

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James Brownyard vs. US. Bureau of Prisons	CJ/Corrections	Pending
Wadsworth vs. State	NR/Water Resources	Pending
Ellis Skinner vs. State	CJ/Corrections	Closed
Don Carlton vs. State	CJ/Corrections	Closed
Charles Sharp vs. State	CJ/Corrections	Closed
Richard Elisondo vs. State	CJ/Corrections	Closed
Jensen vs. State	CJ/Corrections	Closed
John George vs. State	CJ/Corrections	Closed
Frank Lengsfeld vs. State	CJ/Corrections	Closed
State vs. Idaho State Poetry Society	AL/Wage Collection	Pending
In the interest of: Burke Children	HW/Miscellaneous	Closed
Kathleen Durkin vs. Daryl Ott	HW/Miscellaneous	Pending
State vs. Arlene Ellis	AP/Miscellaneous	Closed
State vs. Betty Jane Mitchell	AP/Miscellaneous	Pending
State vs. Arthur Davis	AP/Miscellaneous	Pending
In the interest of: Ava Smith	HW/Miscellaneous	Closed
State vs. G.J. and Ralph Harmon	AL/Wage Collection	Closed
In the interest of: Vicky Hancock	HW/Miscellaneous	Closed
Ellis Skinner vs. Ed Dermitt	CJ/Corrections	Closed
State vs. Kelly McGrath	BR/Consumer Protection	Pending
SOI/Purviance vs. William Browing	HW/Miscellaneous	Closed
State vs. Lance Ives	HW/Miscellaneous	Closed
Arnold vs. Arnold	HW/Miscellaneous	Closed
SOI/Hyde vs. Hyde	HW/Miscellaneous	Closed
Ben Garcia vs. Bo. of Examiners	SF/Miscellaneous	Pending
In the interest of: Terry and Terisa Marshall	HW/Miscellaneous	Closed
State vs. Sonsteng	HW/Miscellaneous	Pending
SOI/Kegley vs. Kegley	HW/Miscellaneous	Closed
State vs. Teachers Mutual Ins.	BR/Miscellaneous	Pending
Sowers vs. Rollins	HW/Miscellaneous	Closed
In the matter of: Martin children	HW/Miscellaneous	Closed
U.S. vs. 640.00 Acres	NR/Miscellaneous	Pending
State vs. Sylvester and Peggy Stubblefield	HW/Miscellaneous	Closed
Investigation of: Payette River Ranchettes/Clayton	BR/Consumer Protection	Closed
In the interest of: Marshall Williams	HW/Miscellaneous	Closed
SOI/Meeks vs. Robert Tafte	HW/Miscellaneous	Pending
State vs. Harry and Marvin Johnson	NR/Miscellaneous	Pending
State vs. Arthur Johnson	AP/Miscellaneous	Pending
State vs. Dennis Svenson	AP/Miscellaneous	Closed
State vs. Richard Rodriquez	AP/Miscellaneous	Closed
State vs. Urquhart and Baxter	AP/Miscellaneous	Closed
Eddie Drapeau vs. State	AP/Miscellaneous	Pending
Ellen Marks vs. Karen Vehlow	AP/Miscellaneous	Closed

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State vs. Assoc. Distributors	AL/Wage Collection	Closed
Winchel vs. Winchel	HW/Miscellaneous	Closed
James Miller vs. Watt Prather	AL/Judiciary	Closed
John Massie vs. Bannock County	AL/Miscellaneous	Closed
Peppi Flores vs. Judge Lodge	AL/Miscellaneous	Closed
Darwin Osborn vs. L.D. Smith	CJ/Corrections	Pending
State vs. Steven Baines	HW/Miscellaneous	Pending
SOI/Walker vs. Larry Bean	HW/Miscellaneous	Pending
Fransen vs. Unknown Claimants	NR/Water Resources	Pending
In the interest of:	HW/Miscellaneous	Closed
Baby Girl Ward		
State vs. Jeffrey Peterson	HW/Miscellaneous	Pending
SOI/Murray vs. Smith	HW/Miscellaneous	Pending
Palmer, Jacobs and Talmage vs. State	CJ/Corrections	Closed
State vs. Al Tanner	AL/Wage Collection	Pending
State vs. Truman Sines	AL/Wage Collection	Pending
State vs. Lazy J Sales	AL/Wage Collection	Pending
Linhart vs. Linhart	HW/Miscellaneous	Closed
Marlie Rose vs. State	CJ/Corrections	Closed
Richare Elisondo vs. State	CJ/Corrections	Closed
Peppi Flores vs. State	CJ/Corrections	Closed
State vs. Dale Jones	NR/Miscellaneous	Pending
Injunction of:	SF/Miscellaneous	Closed
C. Miller		
In the matter of:	HW/Miscellaneous	Closed
Application of Carlstrom		
State vs. Randy Hennings	HW/Miscellaneous	Closed
Rudolph Trevino vs. Ed Dermitt	CJ/Corrections	Closed
State vs. Terry Smedley	AL/Wage Collection	Pending
State vs. John and Emilie Pound	AL/Wage Collection	Closed
In the interest of:	HW/Miscellaneous	Closed
Vera Champion		
Tom McPhie vs. Crowl and Smith	CJ/Corrections	Closed
State vs. Perry White	AP/Miscellaneous	Pending
State vs. Robert Vankeuren	AP/Miscellaneous	Pending
State vs. James Ownes	AP/Miscellaneous	Pending
Danny Walker vs. Blaine Skinner	AP/Miscellaneous	Closed
State vs. Gregory Curtis	AP/Miscellaneous	Pending
State vs. Ivan Dudley	AP/Miscellaneous	Pending
State vs. William Lenz	AP/Miscellaneous	Pending
State vs. Cary Burgess	AP/Miscellaneous	Pending
State vs. Lincoln Harris	AP/Miscellaneous	Pending
State vs. Mathews and Curns	AP/Miscellaneous	Closed
State vs. Jefferson Hood	AP/Miscellaneous	Pending
State vs. Dale Gibson	AP/Miscellaneous	Pending
State vs. David Hutcherson	AP/Miscellaneous	Closed
State vs. Jennifer Duey	AL/Wage Collection	Pending
State vs. Philip Toohill	AP/Miscellaneous	Pending
State vs. Roger Fairchild	AP/Miscellaneous	Pending
State vs. Steven Atwood	AP/Miscellaneous	Pending
State vs. Alvin Carver	AP/Miscellaneous	Closed
State vs. Lee Cook	AP/Miscellaneous	Pending
State vs. Wesley Pinson	AP/Miscellaneous	Pending
Pierce and Watkins vs. Pete Cenarrusa	SF/Miscellaneous	Closed

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Elisondo and Hatfield vs. State	CJ/Corrections	Closed
Rawleigh Anderson vs. State	CJ/Corrections	Closed
Human Rights Comm. vs. Snake River School Dist.	AL/Human Rights	Pending
State vs. Mike Krall	AL/Wage Collection	Pending
State vs. Ken Stavast	AL/Wage Collection	Pending
State vs. Tim Cockrum	AL/Wage Collection	Pending
State vs. Effie Curtis	AL/Wage Collection	Closed
State vs. Idaho Answering Exchange	AL/Wage Collection	Pending
Vera Coon vs. State	HW/Miscellaneous	Closed
Christopher Moon vs. State	CJ/Corrections	Closed
Randy Adams vs. State	CJ/Corrections	Closed
Bobby Beason vs. Ed Dermitt	CJ/Corrections	Closed
Charles Miller vs. Pete Cenarrusa	SF/Miscellaneous	Pending
State vs. Phillip Bliss	HW/Miscellaneous	Pending
In the interest of: Shawn Southworth	HW/Miscellaneous	Closed
Frizzell vs. Swafford	AL/Miscellaneous	Pending
Nichols vs. Crowl	CJ/Corrections	Pending
State vs. Robert Fisher	AP/Miscellaneous	Pending
State vs. Ron Evans	AP/Miscellaneous	Pending
Melton Gibbs vs. State	AP/Miscellaneous	Pending
State vs. David Hutcherson	AP/Miscellaneous	Pending
State vs. Carlos Mata	AP/Miscellaneous	Pending
State vs. Douglas B. Coffin	AP/Miscellaneous	Pending
State vs. Robert Glenn	AP/Miscellaneous	Pending
Clark Kerr vs. Rocky Watson	AP/Miscellaneous	Pending
State vs. Archie Conway	HW/Miscellaneous	Pending
State vs. Bud Rentelman	HW/Miscellaneous	Closed
State vs. Rodney Peak	HW/Miscellaneous	Pending
Michael Frost vs. State	CJ/Corrections	Closed
Idaho Power vs. State	NR/Water Resources	Pending
State vs. Lorris McCroskey	NR/Water Resources	Pending
Investigation of: Transglobal Merch.	BR/Consumer Protection	Closed
State vs. Robert Kitzman	AP/Miscellaneous	Closed
State vs. Frank Kitchen	AP/Miscellaneous	Closed
SOI/Bay vs. Gary Bay	HW/Miscellaneous	Closed
In the interest of: Misty Strid	HW/Child Protection	Closed
Robert Larkin vs. Ed Dermitt	CJ/Corrections	Pending
Syd Talmage vs. Judge McConnell	CJ/Corrections	Pending
State vs. Richtron AG-Land Indus.	AL/Wage Collection	Pending
Idaho Power Co. vs. State	NR/Lands	Closed
State vs. Mike Krall	AL/Wage Collection	Pending
J. Ferguson vs. Arthur Rourke	AL/Education	Pending
Dan Goodrick vs. George Miller	CJ/Corrections	Closed
State vs. Mary Katt	HW/Miscellaneous	Pending
State vs. Herb McLoughlin	AL/Wage Collection	Closed
State vs. Joyce Benham	HW/Miscellaneous	Pending
Peppi Flores vs. Dr. Miller	CJ/Corrections	Pending
State vs. Royale Trans.	AL/Wage Collection	Pending
State vs. Jay Brewerton	AL/Wage Collection	Closed
State vs. Sunshine Trans.	AL/Wage Collection	Pending
In the interest of: Shannon Bowles	HW/Miscellaneous	Closed

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Fayant vs. Fayant/SOI	HW/Miscellaneous	Pending
Leroy Kary vs. State	CJ/Corrections	Closed
In the interest of:	HW/Miscellaneous	Closed
D. Montgomery		
State vs. Gerald Dutt	HW/Miscellaneous	Closed
SOI/Edson vs. Charles B. Doty	HW/Miscellaneous	Closed
Gerald Lawrence vs.	LA/Miscellaneous	Closed
Liquor Dispensary		
State vs. Joan Hunter	CJ/Miscellaneous	Closed
State vs. Ernest Lloyd	AP/Miscellaneous	Pending
State vs. Eldon Williams	AP/Miscellaneous	Pending
State vs. Mark Coladonato	AP/Miscellaneous	Pending
State vs. Rickie Mitchell	AP/Miscellaneous	Pending
State vs. Jerry Tucker	AP/Miscellaneous	Pending
State vs. Linda Mares	AL/Wage Collection	Pending
State vs. Ponderosa Springs	AL/Wage Collection	Closed
State vs. Ray Cammack	AL/Wage Collection	Closed
Avery vs. Middlemist & SOI	HW/Miscellaneous	Pending
Wallace S. Stormoen vs.	AP/Miscellaneous	Closed
John Evans		
In the interest of:	HW/Miscellaneous	Closed
Jeanna Roegner		
In the interest of:	HW/Child Protection	Closed
Grosbeck Children		
Alfred Bourne vs. Lt. Mohoney	CJ/Corrections	Pending
State vs. John Isaacson	BR/Consumer Protection	Pending
In the interest of:	HW/Miscellaneous	Closed
Baby Boy Galbraith		
State vs. John Peterson	AL/Wage Collection	Closed
Donald Silverson vs. State	CJ/Corrections	Closed
State vs. Chester Lewis	AP/Miscellaneous	Closed
State vs. Chester Lewis	AP/Miscellaneous	Closed
Garrett Freightlines vs. State	AL/Miscellaneous	Closed
State vs. Tammie Tucker	AL/Wage Collection	Closed
In the matter of:	NR/Water Resources	Pending
Snake River		
Sena vs. State	CJ/Corrections	Closed
State vs. Lady Corp.	AL/Wage Collection	Pending
State vs. Edward Hunnicutt	AL/Wage Collection	Pending
State vs. Earl Yearsley	AL/Wage Collection	Pending
State vs. Terry Pegram	AL/Wage Collection	Pending
Keith Cline vs. Robertsons	BR/Miscellaneous	Pending
State vs. NW Fed. of	BR/Miscellaneous	Pending
Independent Bus.		
In the interest of:	HW/Miscellaneous	Closed
Trevino Children		
In the interest of:	HW/Miscellaneous	Closed
Baby Boy Ochsner		
In the interest of:	HW/Miscellaneous	Closed
Angel Manso		
Stringer vs. State	NR/Lands	Closed
Mike Hansen vs. State	CJ/Corrections	Closed
State vs. Bill Nutt	AL/Wage Collection	Closed
Charles Miller vs. John Evans	AL/Miscellaneous	Pending
Manuel Herrera vs. C.W. Crowl	CJ/Corrections	Pending

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State vs. Robert Gindt	AL/Wage Collection	Closed
State vs. William Scott	AL/Wage Collection	Pending
SOI/Miller vs. Laura Hayden	HW/Miscellaneous	Pending
Chad Anderson vs. Jerry Evans	AL/Education	Pending
Peppi Flores vs. 3rd Dist. Ct.	AL/Judiciary	Closed
Laurie Rackham vs. Benjamin Jones	HW/Miscellaneous	Closed
In the interest of: Shaneen Myers	HW/Miscellaneous	Closed
Kimberley Care Center vs. State	HW/Miscellaneous	Pending
State vs. Fritz Trudeau	HW/Miscellaneous	Pending
State vs. Tim Hildreth	AL/Wage Collection	Pending
Francis Palmer vs. Ed Dermitt	CJ/Corrections	Pending
State vs. Fred Hammond	BR/Consumer Protection	Pending
Estate of Calvert Carlson	HW/Miscellaneous	Pending
In the interest of: Baby Girl Montano	HW/Miscellaneous	Closed
In the interest of: Tommy Longie	HW/Miscellaneous	Pending
State vs. Idaho Bumper and Chrome	AL/Wage Collection	Closed
State vs. Claude Dallas	CJ/Homicide	Pending
Pry vs. Nagel	SF/Taxation	Pending
State vs. Holmes	AP/Orig/Trial/Remedies	Pending
State vs. Otto	AP/Miscellaneous	Pending
State vs. Hoisington	AP/Miscellaneous	Pending
In the matter of: Kory Lee Sager vs. State	AP/Miscellaneous	Pending
State vs. Lepage	AP/Homicide	Pending
Williamson vs. Brummett	AP/Miscellaneous	Pending
State vs. Goodrick	AP/Criminal Appeal	Pending
State vs. Huggins	AP/Criminal Appeal	Pending
State vs. West	AP/Criminal Appeal	Pending
Brock and Cornwall Mitchell vs. Idaho H&W	HW/Miscellaneous	Closed
State vs. Ray Rose	AP/Miscellaneous	Closed
In the interest of: Roessler Children	HW/Miscellaneous	Closed
State vs. Scott Dobbins	AP/Miscellaneous	Pending
Johnny Ybarra vs. Dermitt	AP/Miscellaneous	Pending
State vs. Rowett and Riess	AP/Miscellaneous	Pending
State vs. Steven Clark	AP/Miscellaneous	Pending
Gilbert Flores vs. State	AP/Miscellaneous	Pending
State vs. Gilberto Gonzales	AP/Miscellaneous	Pending
State vs. Christopher Wilcott	AP/Miscellaneous	Pending
State vs. Melvin Major	AP/Miscellaneous	Pending
State vs. James Hanson	AP/Miscellaneous	Pending
State vs. James Gartiot	AP/Miscellaneous	Pending
State vs. Robert Jones	AP/Miscellaneous	Closed
State vs. John Chambliss	AP/Miscellaneous	Pending
State vs. Gilberto Gonzales	AP/Miscellaneous	Pending
Charles Miller vs. Evans and Donaldson	AL/Miscellaneous	Pending
Harrison & Penny Downing vs. State	HW/Miscellaneous	Pending

Carter and Josman vs. State	HW/Miscellaneous	Pending
Michael Phillips vs. Crowl	CJ/Corrections	Pending
Bobby Beason vs. Bd. of Corr.	CJ/Corrections	Pending
State vs. Steve Bailey	AL/Wage Collection	Pending
Peppi Flores vs. Judge McConnell	AL/Judiciary	Closed
Burlington Northern vs. Frederickson	AL/Miscellaneous	Pending
Ron Wheeler vs. State	CJ/Corrections	Closed
Walter Balla vs. State	CJ/Corrections	Closed
Fred Ruybal vs. State	CJ/Corrections	Closed
State vs. Robert Gindt	AL/Wage Collection	Closed
State vs. Robert Gindt	AL/Wage Collection	Closed
State vs. Duane Espeland M.D.	AL/Wage Collection	Pending
State vs. Esiquio Palacios	AL/Wage Collection	Pending
State vs. Lopez/Billiard Den	AL/Wage Collection	Closed
State vs. Robert Gindt	AL/Wage Collection	Closed
Anthony Hoch vs. R.J. Lippman	CJ/Corrections	Pending
State vs. Haworth and Cowan	AP/Miscellaneous	Pending
Marguerite Hill vs. Randall Bullard	HW/Miscellaneous	Closed
Leroy Kary vs. Darrol Gardner	CJ/Corrections	Pending
Dan Goodrick vs. State	CJ/Corrections	Closed
State vs. Morris/Elevation 6000	AL/Wage Collection	Pending
State vs. Jerry Armstrong	BR/Consumer Protection	Pending
State vs. Mike Krall	AL/Wage Collection	Pending
State vs. Mike Krall	AL/Wage Collection	Pending
In the interest of:	HW/Miscellaneous	Closed
Thomas Wester		
State vs. Rapolla and Assoc.	AL/Wage Collection	Closed
In the interest of:	HW/Miscellaneous	Closed
Oliverson Children		
In the interest of:	HW/Miscellaneous	Closed
Jason and William Moore		
McCabe vs. Darrol Gardner	CJ/Corrections	Pending
Charles Dillard vs. SOI/H & W	HW/Miscellaneous	Pending
John Woods vs. State	HW/Miscellaneous	Pending
Investigation of:	BR/Consumer Protection	Closed
McCollum Ford		
State vs. Tony Silva	AL/Wage Collection	Pending
In the interest of:	HW/Miscellaneous	Closed
Bianca Gleisberg		
State vs. Commerce Journal	AL/Wage Collection	Closed
Roberts vs. Corrections	CJ/Corrections	Pending
Larry Martinez vs. State	AP/Miscellaneous	Closed
State vs. Robert Hunter	AP/Miscellaneous	Closed
State vs. William Mendenhall	AP/Miscellaneous	Pending
State vs. Richard Elisondo	AP/Miscellaneous	Pending
State vs. Robert Howerton	AP/Miscellaneous	Pending
State vs. Victor Camp	AP/Miscellaneous	Pending
State vs. Linus Bowman	AP/Miscellaneous	Pending
State vs. Bundy	CJ/Corrections	Closed
In the interest of:	HW/Child Protection	Pending
Aguiles Saiz		
Robert M. Hall vs.	CJ/Admin./Licensure	Pending
Id. Horse Racing Comm.		
State vs. USA Cataldo #7 Fire	NR/Lands	Pending

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State vs. USA Robin Roost Fires	NR/Lands	Pending
Yates vs. State	CJ/Corrections	Closed
Nelson vs. State	CJ/Corrections	Closed
Galaviz vs. State	CJ/Corrections	Closed
Ortega and Beason vs. John Evans	CJ/Corrections	Closed
State vs. Buchanan/Snoopy's Restaurant	AL/Wage Collection	Pending
State vs. Tom Sankey	AL/Wage Collection	Pending
State vs. JTS Mortgage, Joetzki	AL/Wage Collection	Pending
State vs. Alcorn/Fore n Aft	NR/Lands	Pending
State vs. Continental Mineral Corp.	AP/Miscellaneous	Pending
Charles Miller vs. Glen Walker	BR/Consumer Protection	Closed
Investigation of: Idaho Business Surveys		
In the interest of: Derek Hansen	HW/Miscellaneous	Closed
Hanson vs. Rocky Watson	AP/Miscellaneous	Pending
In the interest of: Rhonda Hansen	HW/Miscellaneous	Closed
In the interest of: Sherry Goldman	HW/Miscellaneous	Pending
Hudson vs. State	CJ/Corrections	Closed
In the interest of: Fuell Children	HW/Child Protection	Pending
State vs. Jim Jeffrey	AP/Miscellaneous	Pending
State vs. Robert Pyne	AP/Miscellaneous	Pending
State vs. Wayland Cowen	AP/Miscellaneous	Pending
In the interest of: Debra Bau	HW/Child Protection	Pending
In the interest of: Travis Squires	HW/Miscellaneous	Closed
In the interest of: Clark Kinne	HW/Miscellaneous	Pending
State vs. Geraldine Graham	HW/Miscellaneous	Pending
In the interest of: Baby Boy Pousha	HW/Miscellaneous	Closed
In the interest of: Barbette McLaws	HW/Miscellaneous	Closed
Sunshine Mining Co. vs. Silver Dollar Mining	BR/Miscellaneous	Pending
State vs. Avery-Tate	AL/Wage Collection	Pending
State vs. Trecht	AL/Wage Collection	Closed
State vs. Keith Kipper	AL/Wage Collection	Pending
State vs. Cliff Wiseman	AL/Wage Collection	Pending
State vs. Joetzki	AL/Wage Collection	Pending
State vs. Joetzki	AL/Wage Collection	Pending
In the interest of: Snarr Children	HW/Miscellaneous	Closed
Darlene & Sonny Gladsen vs. State	HW/Miscellaneous	Pending
In the interest of: Shane Lockwood	HW/Miscellaneous	Closed
In the interest of: Kennedy and Yeiter Children	HW/Miscellaneous	Closed
Izatt and Segelson vs. State	CJ/Corrections	Closed
State vs. Galaviz	AP/Miscellaneous	Pending

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Holmes vs. State	AP/Miscellaneous	Pending
State vs. Wendel Shirley	AP/Miscellaneous	Pending
State vs. Dyer	NR/Lands	Pending
State vs. Barbara Wilson	AL/Wage Collection	Pending
State vs. Stephen Gleason	AL/Wage Collection	Closed
State vs. Farm Commodity	AL/Wage Collection	Pending
Bradley vs. Darrol Gardner	CJ/Corrections	Closed
Holmes vs. State	CJ/Corrections	Closed
Milton vs. State	CJ/Corrections	Closed
State vs. Frank Young	HW/Miscellaneous	Pending
State vs. Terry Fritz	HW/Miscellaneous	Pending
State vs. Evelyn Fuller	AP/Miscellaneous	Pending
In the matter of: Scott Bybee	HW/Miscellaneous	Closed
Balla vs. State	CJ/Corrections	Closed
John Carpenter vs. Steve Allred	NR/Water Resources	Pending
Nettleton vs. Hulet	NR/Water Resources	Pending
State vs. Don Marks	AL/Wage Collection	Pending
James Waller vs. State	CJ/Corrections	Closed
In the interest of: Jason Bierma	HW/Miscellaneous	Closed
State vs. John Lewis	AP/Miscellaneous	Pending
SOI/Ahrendon vs. Gary Scott	HW/Miscellaneous	Pending
In the interest of: Chris Calonge	HW/Miscellaneous	Closed
Barry Caldwell vs. State	CJ/Corrections	Closed
Carlstead vs. State	NR/Lands	Pending
State vs. Ardith Coffman	AL/Wage Collection	Pending
In the interest of: Regina Smith	HW/Miscellaneous	Closed
In the interest of: Hines Children	HW/Miscellaneous	Pending
Robert Sparrow vs. State	CJ/Miscellaneous	Closed
State vs. Chris Hollinger	HW/Miscellaneous	Closed
State vs. Pompey Johnson	AL/Wage Collection	Closed
Chris Moon vs. State	CJ/Corrections	Closed
Goodrick and Phillips vs. State	CJ/Corrections	Closed
Randy Zeigler vs. State	CJ/Corrections	Closed
State vs. Krinn Jones	HW/Miscellaneous	Closed
SOI/Schuler vs. Bruce Mullen	HW/Miscellaneous	Closed
State vs. Ronald S. Walker	AP/Miscellaneous	Pending
In the interest of: Cox Children	HW/Miscellaneous	Pending
State vs. IHMO/Health Guard	BR/Insurance	Pending
In the interest of: Sherry Leininger	HW/Miscellaneous	Closed
State vs. Buy and Sell Press	AL/Wage Collection	Pending
In the matter of: Shannon Schow	HW/Miscellaneous	Pending
State vs. Robert Gindt	AL/Wage Collection	Closed
State vs. Idaho Answering Exchange	AL/Wage Collection	Closed
State vs. Treasure Valley Pools	AL/Wage Collection	Closed
State vs. Ebony Angel	AP/Miscellaneous	Pending
State vs. John Buroughs, Jr.	AP/Miscellaneous	Pending
Steven Dirk Werneth vs. Darrol Gardner	CJ/Corrections	Pending

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State vs. Estate of Juanita Lavendar	HW/Miscellaneous	Closed
State vs. Juan Aguilar	AP/Miscellaneous	Closed
State vs. Lifestyle Publications	AL/Wage Collection	Pending
Gordon Garner vs. State	CJ/Corrections	Closed
State vs. Jimmy D. Russell	AP/Miscellaneous	Pending
State vs. D.R. McMahon, Inc.	AL/Wage Collection	Closed
Ron Hoye, Sr. vs. Lynn Thomas	AL/Miscellaneous	Closed
State vs. Daniel Stoddard	AP/Miscellaneous	Pending
State vs. Steven Burk	AP/Miscellaneous	Pending
State vs. Rocky Price	AP/Miscellaneous	Pending
State vs. Daniel Stoddard	AP/Miscellaneous	Pending
State vs. Kevin Bell	AP/Miscellaneous	Pending
State vs. Frank Schrom	AP/Miscellaneous	Pending
State vs. Robert Gilman	AP/Miscellaneous	Pending
State vs. Alvin Palin	AP/Miscellaneous	Pending
Sam and Maudean Blankenship vs. SOI ET AL	NR/Lands	Closed
In the interest of: Kenna High	HW/Miscellaneous	Closed
Robert Sanders vs. State	CJ/Corrections	Closed
In the interest of: Peron Children	HW/Miscellaneous	Pending
State vs. Joe Swisher	AP/Miscellaneous	Pending
State vs. Marion Rollins	HW/Miscellaneous	Pending
State vs. Linda and Howard Jensen	HW/Miscellaneous	Pending
State vs. Treasure Valley Pools	AL/Wage Collection	Closed
State vs. Darold Ames	AL/Wage Collection	Closed
State vs. Andy Oleske	AL/Wage Collection	Closed
State vs. Ron Casper	AL/Wage Collection	Closed
State vs. Bernice Dable	AL/Wage Collection	Closed
Neil and Tessa Durfee vs. Almo Water Co.	NR/Water Resources	Closed
State vs. John W. Hodges	AP/Miscellaneous	Pending
State vs. Steven Holman	AP/Miscellaneous	Pending
In the interest of: Heather Sharp	HW/Miscellaneous	Closed
State vs. David Hoffman	AP/Miscellaneous	Pending
State vs. Richard G. Spor	AP/Miscellaneous	Pending
Brent Barron vs. State	CJ/Corrections	Pending
George Pittman vs. John Maynard	AL/Miscellaneous	Pending
Glenda Rawson vs. Id. Bd. of Cosmetology	AL/Self-Governing	Pending
State vs. Donald Young	AP/Miscellaneous	Pending
In the matter of: Estate of Susan Selph	HW/Miscellaneous	Closed
State vs. Joseph W. Cross	AP/Miscellaneous	Pending
State vs. Kenneth Vaughn	AP/Miscellaneous	Pending
State vs. Cyrus Maxfield	AP/Miscellaneous	Pending
In the interest of: Deleon Children	HW/Miscellaneous	Closed
Donald Holmes vs. State	CJ/Corrections	Pending
Bobby Beason vs. Corrections	CJ/Corrections	Pending
William Reeves vs. State	AP/Miscellaneous	Pending
Paul McPherson vs. State	CJ/Corrections	Closed
Victor Haworth vs. State	CJ/Corrections	Closed

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State vs. Richard Goldman	AP/Miscellaneous	Pending
State vs. Scott Grooms	AP/Miscellaneous	Pending
State vs. Dennis Spor	AP/Miscellaneous	Pending
Ronald T. Olsen vs. SOI/Gardner	CJ/Corrections	Closed
Eldon Orin Williams vs. SOI ET AL	CJ/Corrections	Pending
State vs. Ray Silva	AL/Wage Collection	Pending
State vs. Doug Taylor, Jr.	AL/Wage Collection	Closed
Duane Vanhale vs. S.W. Blackwell	AL/Miscellaneous	Closed
State vs. Neil Leatherwood	AP/Miscellaneous	Pending
State vs. Kevin Terris	AP/Miscellaneous	Pending
Robert St. John vs. James G. Reid	CJ/Corrections	Closed
Dan Goodrick vs. George Miller and Ralph Pierce	CJ/Corrections	Pending
John Byron Trefren vs. Crowl	AP/Miscellaneous	Pending
State vs. Manuel Sena	AL/Wage Collection	Pending
State vs. Broadway Realty	CJ/Corrections	Closed
Walter Balla vs. Ray McNichols	AL/Wage Collection	Pending
State vs. Harvey Wright	AL/Wage Collection	Closed
State vs. Carole Halstead	CJ/Miscellaneous	Pending
State vs. Dovey Small	CJ/Homicide	Pending
State vs. Randy Lynn McKinney	HW/Miscellaneous	Pending
State Hospital North/H&W vs. Mike Baker	HW/Miscellaneous	Pending
SOL/Nicole Rasmussen vs. Craig Milstead	HW/Miscellaneous	Pending
State vs. Bernie Gonzales	HW/Miscellaneous	Pending
State vs. James Casey, Jr.	AL/Wage Collection	Pending
State vs. Cyd Crow	AL/Wage Collection	Pending
State vs. Idaho Answering Exchange	AL/Wage Collection	Closed
State vs. Walter Gray	AL/Wage Collection	Pending
State vs. Idaho Answering Exchange	NR/Agriculture	Pending
SOI/Agriculture vs. Robert, Mary & Charles Wrigley	CJ/Corrections	Pending
Thomas Atkinson vs. State	CJ/Corrections	Pending
Melvin McCabe vs. State	HW/Miscellaneous	Closed
State vs. Nick Aguayo	HW/Miscellaneous	Pending
State vs. Tim Phillips	HW/Miscellaneous	Closed
State vs. John F. Leclair	CJ/Corrections	Pending
Lewis Segelson & C. Izatt vs. C.W. Crowl	AP/Miscellaneous	Pending
State vs. Sammy Camarillo	HW/Miscellaneous	Pending
H&W vs. Dixie Dawn Murkle	BR/Consumer Protection	Closed
In the matter of: Norman Angell	AL/Wage Collection	Closed
State vs. Sunshine Transportation Co.	AP/Miscellaneous	Pending
State vs. Lee Lisher	AL/Wage Collection	Pending
State vs. Donald Ihm	HW/Miscellaneous	Pending
In Re. Guardianship of: Steve Eric Powlus	AP/Miscellaneous	Pending
State vs. Ray Hernandez	AP/Miscellaneous	Pending
State vs. Anthony Galaviz	HW/Miscellaneous	Pending
SOI/Christine Hodges vs. Steven V. Hodges		

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State vs. Oliver J. Holbert	AL/Wage Collection	Closed
State vs. Jack Fries	AL/Wage Collection	Pending
State vs. Juanita O. Holbert	AL/Wage Collection	Closed
Walter Balla vs. SOI ET AL	CJ/Corrections	Pending
State vs. Dona K. Norgard	HW/Miscellaneous	Closed
In the interest of: Todd Gallegos	HW/Miscellaneous	Closed
State vs. Gary Earl Bay	HW/Miscellaneous	Pending
State vs. Roger Baruth	AP/Miscellaneous	Pending
State vs. Idaho Answering Exchange	AL/Wage Collection	Pending
State vs. Bear Lake West	AL/Wage Collection	Pending
State vs. Barbara Cornelison	AL/Wage Collection	Pending
Walter Balla vs. SOI ET AL	CJ/Corrections	Pending
Inez Ybarra vs. State	CJ/Corrections	Closed
Ronald Boyd Maxfield III vs. Karen Thomas	HW/Miscellaneous	Pending
Antonio Galaviz vs. Darrol Gardner	CJ/Corrections	Pending
Dennis G. Clark vs. C.W. Crowl	CJ/Corrections	Pending
Wendel Shirley vs. Darrol Gardner	CJ/Corrections	Pending
Sierra Life Insurance vs. Monroe Gollaher	BR/Insurance	Pending
State vs. Albert Smith	AP/Miscellaneous	Pending
In the interest of: Ronnie Cantu	HW/Miscellaneous	Closed
State vs. Michael Carter	AP/Miscellaneous	Pending
State vs. Leon Bridges	AL/Wage Collection	Closed
State vs. Annaleel V. Johnson	HW/Miscellaneous	Closed
SOI/Mary Frear vs. William Coontz	HW/Miscellaneous	Pending
Larry H. Harsh vs. Id. Chiropractic Bd.	AL/Self-Governing	Pending
Richard Elisondo vs. Chuck Anthony	CJ/Corrections	Pending
Ernest Grierson vs. Id. Bd. of Corrections	CJ/Corrections	Pending
State vs. Idaho Answering Exchange	AL/Wage Collection	Pending
State vs. Philip Hayden	AP/Miscellaneous	Pending
State vs. Charley Clark, Jr.	AP/Miscellaneous	Pending
SOI/Patricia Rossetti vs. Cory Robert Sevy	HW/Miscellaneous	Pending
SOI/Karen Wilkinson vs. Larry Houser	HW/Miscellaneous	Pending
In the interest of: Lachappelle Children	HW/Child Protection	Pending
State vs. Wes Con, Inc.	NR/Environment	Pending
Charles Vetsch vs. Warden Gardner	CJ/Corrections	Pending
Peppi Flores vs. Darrol Gardner	CJ/Corrections	Pending
David Lee vs. State	CJ/Corrections	Pending
State vs. Walter Humble	AP/Miscellaneous	Pending
State vs. Mark Pederson	AL/Wage Collection	Pending
Ahmad Mashayekan vs. U. of I. Bd of Regents	AL/Education	Pending
Saadat Anvar vs. U. of I. Bd of Regents	AL/Education	Pending
James Irvin Gray vs. Richard Ackerman	AP/Miscellaneous	Pending
State vs. Jerry Lee Russell	AP/Miscellaneous	Pending

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Human Rights Comm and EEO Comm. vs. B&D Automotive, Inc.	AL/Human Rights	Pending
Melvin McCabe vs. C.W. Crowl	CJ/Corrections	Pending
In the interest of: Sean Goodwin	HW/Child Protection	Closed
In the interest of: Sean Goodwin/See #01019	HW/Child Protection	Closed
State vs. Robert E. Nelson	CJ/Miscellaneous	Pending
State vs. Id. Answering Exchange	AL/Wage Collection	Pending
In the interest of: Anthony Vollman	HW/Child Protection	Pending
In the interest of: George Dewey	HW/Child Protection	Pending
State vs. Sea Gull Financial	AL/Wage Collection	Pending
ID. Human Rights Comm vs. Sears and Robuck Co.	AL/Human Rights	Pending
State vs. Billy Dale Smith	AP/Miscellaneous	Pending
In the interest of: Meade Children	HW/Miscellaneous	Pending
Bradford Miller vs. State	CJ/Corrections	Pending
State vs. Assoc. of Well Drillers	AL/Wage Collection	Closed
SOI/Sonja Squires vs. William E. Hopkins	HW/Welfare	Closed
State vs. Thomas McPhie	AP/Miscellaneous	Pending
State vs. Lee A. Rice	AL/Wage Collection	Closed
State vs. James Hennessey	AL/Wage Collection	Pending
State vs. Mervin Preston	AL/Wage Collection	Closed
State vs. Matt Stoor	AL/Wage Collection	Pending
State vs. Bear Lake West	AL/Wage Collection	Closed
State vs. Futurity Sounds, Ltd.	AL/Wage Collection	Pending
Id. Dept. of Finance vs. Manuel Garren	BR/Finance	Pending
State vs. Mary B. Blake	HW/Miscellaneous	Pending
State vs. Jim Glenn	HW/Miscellaneous	Pending
State vs. Susan M. Beck	HW/Miscellaneous	Pending
In the interest of: Shane A. Hatley	HW/Miscellaneous	Closed
Greg Curtis vs. C.W. Crowl	CJ/Corrections	Pending
Jacquelyn Mann vs. Sam Mann	HW/Miscellaneous	Pending
State vs. Dean Arthur Schwartzmiller	AP/Miscellaneous	Pending
State vs. Judith M. Green	HW/Miscellaneous	Pending
State vs. Larry Haycock	HW/Miscellaneous	Pending
State vs. Dick Greenfield	HW/Miscellaneous	Pending
State vs. Ramiro Nava	HW/Miscellaneous	Pending
State vs. J.W. Ray	HW/Miscellaneous	Pending
State vs. Ronnie Russell	HW/Miscellaneous	Pending
State vs. Fay Sessions	HW/Miscellaneous	Pending
State vs. Bob and Joe Treasure	AL/Wage Collection	Pending
Donald Wentz vs. Greg Fisher	CJ/Corrections	Pending
State vs. Gary Register	AP/Miscellaneous	Pending
State vs. Tammy Madson	HW/Miscellaneous	Pending
Lewis Segelson vs. State	CJ/Corrections	Pending
Gary Graham vs. State	CJ/Corrections	Closed

Charles Poindexter vs. State	CJ/Corrections	Closed
James L. Knee vs. William Crowl	CJ/Corrections	Pending
Robert Meiners vs. State	CJ/Corrections	Closed
Kelly Anderson vs. State	CJ/Corrections	Closed

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**OFFICIAL OPINIONS
OF
THE ATTORNEY GENERAL
FOR
1981**



David H. Leroy
Attorney General
State of Idaho

ATTORNEY GENERAL OPINION NO. 81-1

TO: Milton G. Klein
Director
State of Idaho Department of Health and Welfare
Statehouse Mail

Per Request for Attorney General Opinion

QUESTIONS PRESENTED:

1. Under applicable state and federal laws and regulations, is the Department of Health and Welfare prohibited from releasing Medicaid cost reports and audit reports to the public?
2. If the release of Medicaid cost reports and audit reports is not prohibited by law, is the Department of Health and Welfare required by *Idaho Code* §9-301, *Idaho Code* §59-1009, or any other statute to disclose such reports upon request by any member of the public?

CONCLUSIONS:

1. There are no state or federal laws or regulations which prohibit the Department of Health and Welfare from releasing Medicaid cost reports and audit reports to the public unless such reports contain names or identifying information regarding recipients of public assistance.
2. *Idaho Code* §§59-1009 and 9-3001 would require the Department of Health and Welfare to release Medicaid cost reports upon request by any member of the public. They constitute public records by any definition, and, on balance, the public interest would be served by their release.

STATEMENT OF FACTS:

The cost reports and audit reports in question arise from Idaho's participation in the Medicaid program found in Title 19 of the Social Security Act (42 USC 1396 et seq.). The Medicaid program pays for long-term care in skilled nursing facilities or intermediate care facilities on a cost reimbursement basis. Throughout a facility's fiscal year the department makes interim payments to the facility based on the estimated costs to be reimbursed. At the end of the fiscal year the facility submits a cost report on a department form to the department's Office of Audit pursuant to department regulations. That cost report lists the costs of operation which the facility believes should be reimbursed under the department's reimbursement regulations. The Office of Audit then performs an audit on the facility using the cost report as a starting point. The final product of that process is the final audit report which states the department's determination of the properly reimbursable costs of the facility under the department's regulations.

In total, those costs amount to considerable expenditures of public funds. In fiscal year 1980 the department paid long-term care facilities approximately \$30,500,000 out of a total departmental budget of \$169,000,000.

The department has not released audit reports and cost reports to the public in the past in reliance on an informal legal memorandum written in 1976.

ANALYSIS:

1. There are no Idaho statutes or regulations which prohibit the release of Medicaid cost reports or audit reports to the public. The only Idaho statutes which address the confidentiality of Medicaid records are *Idaho Code* §56-221 and *Idaho Code* §56-222. *Idaho Code* §56-221 gives the department the power to adopt regulations "governing the custody, use and preservation of the records, papers, files and communications" of the department. It further requires that such regulations prevent the publication of lists containing the names and addresses of recipients of public assistance or the use of such lists for any "purpose not directly connected with the administration of public assistance." *Idaho Code* §56-222 makes it unlawful for any person to disclose or make use of any list of names, or any information concerning, persons applying for or receiving public assistance except for purposes connected with administration of public assistance. *Idaho Code* §56-201 defines public assistance to include the Medicaid program.

Pursuant to *Idaho Code* §56-202, *Idaho Code* §56-209b, *Idaho Code* §56-221 and *Idaho Code* §56-222, the Director of the Department of Health and Welfare has the duty to promulgate, adopt and enforce rules and regulations for the Medicaid program. Under that authority and others the department has adopted the "Rules Governing the Protection and Disclosure of Department Records Manual." Title 5, Chapter 1 of the *Rules and Regulations of the Department of Health and Welfare*. That set of regulations is the only source of state law other than the enabling statutes regarding the confidentiality of Medicaid records. "Rules Governing Medicaid Provider Reimbursement in Idaho", Title 3, Chapter 10 of the above department rules states that Title 5, Chapter 1 would govern information received by the department in connection with Medicaid provider reimbursement. Similarly, the "Rules Governing Audits of Providers," Title 6, Chapter 1 of the department rules states that the disclosure by the department of any records related to audits of providers must comply with Title 5, Chapter 1.

The regulations found in Title 5, Chapter 1 express a general policy in favor of public access to department records where such access is consistent with the regulations. The regulations then set forth the types of information and the circumstances when disclosure can or cannot take place.

There are no regulations within Title 5, Chapter 1, which prohibit the release of Medicaid cost reports and audit reports. The sections which specifically cover the Medicaid programs are 5-1112 and 5-1116. Section 5-1116 contains provisions which require disclosure of certain types of information, but cost reports and audit reports are not specifically included therein. It contains other provisions preventing disclosure of certain types of information except for purposes directly connected with the administration of the program. The prohibitions against disclosure in that section and Section 5-1112 all relate to the same considerations expressed in the enabling statutes — i.e., information regarding the names, addresses or any other information about recipients cannot be disclosed except within the program.

Since Medicaid cost reports and audit reports usually contain no information regarding individual recipients, there are no provisions in Idaho statutes

or regulations which would prohibit the release of such reports. Furthermore, since the general policy is in favor of public access to the department's records, no inference in favor of such a prohibition can be drawn from the failure of the regulations to specifically authorize their release.

Federal statutes and regulations governing the Medicaid program are almost identical to the Idaho statutes and regulations. The federal laws clearly provided the model for the state laws. The only restriction on the state's ability to disclose information in the Medicaid program is found at 42 USC 1396 a (a) (7) and the regulations promulgated thereunder at 42 CFR 300 et seq. They prohibit disclosure of information regarding individual applicants and recipients only. There are no comparable restrictions regarding providers of health care services and the amounts of public monies they receive.

Therefore, neither state nor federal law would prohibit the release of Medicaid audit and cost reports unless those reports contained information regarding individual recipients. Should such reports contain information on individual recipients, those sections of the report should be excised before the report is released.

2. The Idaho statutes on public disclosure of official records and writings evidence a general public policy in favor of broad public access to such material. Since those statutes have yet to be interpreted by the Idaho Supreme Court their applicability to Medicaid cost reports and audit reports must be inferred from lower court decisions and decisions on similar questions from other jurisdictions. The pertinent Idaho statutes are:

Idaho Code §59-1009:

The public records and other matters in the office of any officer are, at all times during office hours, open to the inspection of any citizen of this state.

Idaho Code §9-301:

Every citizen has a right to inspect and take a copy of any public writing of this state, except as otherwise expressly provided by statute.

Idaho Code §9-311:

Public writings are divided into four classes:

1. Laws.
2. Judicial records.
3. Other official documents.
4. Public records kept in this state of private writings.

Thus the essential question is whether Medicaid cost reports and audit reports fall within the definition of "public records and other matters" in *Idaho Code §59-1009* or "public writings" in *Idaho Code §9-301*. Since *Idaho Code §9-311* defines public writings to include "other official records" and "public records kept in this state of private writings," there would appear to be no significant difference in the scope of the coverage of the two sections. Previous interpretations of those statutes and similar enactments of other states use the same general analysis for both. See *Mac Ewan v. Holm*, 226 Or. 27, 359 P.2d

413 (1961), *Twilegar v. Harris*, Fourth Judicial District for Ada Co. Case No. 72524, Memorandum Decision, (Sept. 3, 1980), Idaho Attorney General Opinion No. 77-52 dated August 24, 1977. Therefore, this opinion will consider the two sections as having essentially identical coverage under the rubric of public records.

The term "public records" is not defined in the *Idaho Code*. *Idaho Code* §67-5751 does contain a definition of "record" to be used for the purpose of deciding how public papers should be managed. However, that definition is of little value since that section of the code is not a disclosure statute and different public policies are involved. As stated in 66 Am. Jur. 2d, *Records and Recording Laws*, Section 19:

The problem of whether a record should be open to public inspection cannot be solved by applying a definition of 'public record' borrowed from cases involving questions other than the right of inspection, in which different considerations are present. See also, *Mac Ewan v. Holm*, *supra*.

The most restrictive definition of public record can be found in the case of *Linder v. Eckard* 261 Iowa 216, 152 N.W.2d 833 (1967). There the court stated "the concept of public records has now generally been extended to embrace not only what is required to be kept [by law] but also what is convenient and appropriate to be preserved as evidence of public actions." In that case the court refused to allow disclosure of property appraisal reports gathered as part of an urban renewal project on the grounds that such reports were preliminary in nature and therefore not part of any public action.

The California courts have used a similar, although slightly broader, definition of public record in interpreting statutes virtually identical to *Idaho Code* §59-1009 and *Idaho Code* §9-301. In *City Council of City of Santa Monica v. Superior Court* 204 Cal. App. 2d 68, 21 Cal. Rptr. 896 (Ct. App. 2nd Dist., 1962) the court stated:

In order that an entry or record of the official acts of a public officer shall be a public record, it is not necessary that such record be expressly required by law to be kept; but it is sufficient if it be necessary or convenient to the discharge of his official duty. Any record required by law to be kept by an officer, or which he keeps as necessary or convenient to the discharge of his official duty, is a public record.

See also 66 Am. Jr. 2d *Records and Recording Laws*, Section 19. The court held that an investigative report concerning misconduct by police officers which had not been acted upon by the city council was not a public record. Similarly, in *Coldwell v. Board of Public Works* 187 Cal. 510, 202 P. 879 (1921) the Court found that preliminary maps, plans, estimates and reports in the office of the San Francisco City Engineer who was working on a municipal water project were preliminary data and thus not public records.

However, it is the opinion of this office that even using the restrictive definition of public record indicated above, Medicaid cost reports and audit reports would be considered public records and thus open to the public. Department regulations require the facility to file a cost report and such reports are filed on department forms. Thus such reports are required by law to be kept. Audit

reports are similarly required by department regulations and evidence the department's final statement on which costs of the facility are properly reimbursable under the Medicaid program. Thus, such audit reports would also be considered public records. The attorneys general of two other states have reached the same conclusion in applying public records statutes with restrictive definitions to the Medicaid program. See *Opinions of The Attorney General of Florida*, April 10, 1980 and *Opinion No. 76-011*, *Opinions of the Ohio Attorney General*, Feb. 24, 1976.

However, it is doubtful that the Idaho Supreme Court would use such a restrictive approach if it were called upon to interpret *Idaho Code* §59-1009 and *Idaho Code* §9-301. The more modern approach to public record disclosure questions has been to balance the public policy considerations in favor of disclosure against those in favor of non-disclosure. In so doing the courts have tipped the scales in favor of public access. In *Twiligar v. Harris, supra*, the Fourth District judge stated:

In reaching a determination based upon a balancing of the interests involved, the Court must ever bear in mind that public policy favors the right of inspection of public records and documents, and it is only in the exceptional case that inspection should be denied.

As a general rule, it has been held that the terms used in a statute defining the right of inspection should be given a broad construction embracing all writings in the custody of public officers, rendering such writings subject to inspection unless there are circumstances justifying non-disclosure. *Mac Ewan v. Holm, supra*.

The California and Iowa cases cited above indicate that this broad balancing test should be used when interpreting *Idaho Code* §59-1009. That section reads "public records and other matters." The California cases used a restrictive definition of the term "public record" but used a broad balancing test to determine what "other matters" can be disclosed to the public. Thus in *Col-dwell v. Board of Public Works, supra*, the court held that the information requested could not be disclosed as public records because it was preliminary in nature but could be disclosed as "other matters" since they were of general public interest and there were no compelling reasons for keeping them from the public.

The leading case exposing this broad balancing test is *Mac Ewan v. Holm, supra*. That court was also interpreting statutes similar to *Idaho Code* §59-1009 and *Idaho Code* §9-301. In a well reasoned opinion the court stated the general philosophy behind its approach:

Writings coming into the hands of public officers in connection with their official functions should generally be accessible to members of the public so that there will be an opportunity to determine whether those who have been entrusted with the affairs of government are honestly, faithfully and competently performing their function as public servants. (Cites omitted) Public business is the public's business. The people have the right to know. Freedom of information about public records and proceedings is their just heritage . . . Citizens . . . must have the legal right to . . . investigate the conduct of their affairs. Cross, *The People's Right to Know*, p. xiii (1953).

And the public interest in making such writings accessible extends beyond the concern for the honest and efficient operation of public agencies. The data collected in the course of carrying on the business of government may be sought by persons who propose to use it for their own personal gain. Thus they may wish to obtain names and addresses for use as a mailing list, or the record of transfers of property to conduct a title insurance search or information for many other purposes. The data gathered by government are available to its citizens for such private purposes. Under our statutes a person may inspect public records and files for a purely personal purpose; as we have indicated above, he need not show a special interest. (Cites omitted).

Since the right of inspection under our statutes is intended to serve these broad purposes, the character of the writing which is subject to inspection is correspondingly broad . . .

The court made it clear, however, that not all documents in the possession of public officials are open to the general public.

The public's right of inspection is not without qualification. There may be circumstances under which the information contained in a record can be justifiably withheld from the person seeking it. Obviously, if it is shown that the information is being sought for an unlawful purpose, the request for it may be denied. ORS 192.030; *State v. Harrison*, 1947, 130 W.Va. 246, 43 S.F.2d 214, 218-219 (dictum); *Payne v. Staunton*, 1904, 55 W.Va. 202, 46 S.E. 927, 932. Even when the request is made for a lawful purpose the public interest may require that the information be withheld. Thus where the information is received in confidence, it may be proper to refuse access to it. In *State ex rel. Crummer v. Pace*, 1935, 121 Fla. 871, 164 So. 723, 102 A.L.R. 748, it was held that the inspection of a municipal record was properly refused where it was received pursuant to a federal statute prohibiting disclosure. And in *City and County of San Francisco v. Superior Court*, 1952, 38 Cal. 2d 156, 238 P.2d 581, confidential information furnished to a municipal corporation by some of its employees for the purpose of establishing rates of compensation was held to be non-accessible. Similarly, in *Mathews v. Pyle*, *supra*, 75 Ariz. at page 81, 251 P.2d at page 897, it was held that a report of a state Attorney General to the Governor was subject to inspection unless "confidential and privileged" or if "disclosure would be detrimental to the best interests of the state." See also, *Coldwell v. Board of Public Works*, *supra*. There are other circumstances which will justify nondisclosure. Thus it has been suggested that inspection may be denied where a citizen seeks documentary evidence in the hands of a district attorney, minutes of a grand jury, or evidence in a divorce action ordered sealed by the court. See *International Union, etc. v. Gooding*, *supra*.

In any event the right of inspection cannot be exercised so as to unreasonably interfere with the business of government. (Cites omitted) . . .

Finally, the court set forth the considerations involved and the initial procedure to be followed in applying its balancing test.

In determining whether the records should be made available for inspection in any particular instance, the court must balance the

interest of the citizen in knowing what the servants of government are doing and the citizen's proprietary interest in public property, against the interest of the public in having the business of government carried on efficiently and without undue interference. The initial decision as to whether inspection will be permitted must, of course, rest with the custodian of the records . . .

The citizen's predominant interest may be expressed in terms of the burden of proof which is applicable in this class of cases; the burden is cast upon the agency to explain why the records sought should not be furnished. Ultimately, of course, it is for the courts to decide whether the explanation is reasonable and to weigh the benefits accruing to the agency from non-disclosure against the harm which may result to the public if such records are not made available for inspection.

More recent decisions have expanded the balancing formula of *Mac Ewan v. Holm*, *supra*, to incorporate the personal privacy interest of citizens supplying information to the government. Only one case has been found where those privacy interests have resulted in non-disclosure. In *Lopez v. Fitzgerald*, 76 Ill. 2d 107, 390 N.E.2d 835 (1979) the court held that unevaluated reports of building code violations could not be disclosed because such action would impinge upon the building owners' due process rights to a hearing on such violations and interfere with the right to lease the property. However, the case is clearly inconsistent with the weight of other authority. Over objections that they impinge on rights of personal privacy, courts have allowed disclosure of public payroll records, *Hastings and Sons Pub. Co. v. City Treasurer* 78 Mass. Adv. SL. 920, 375. N.E.2d 299 (1978); booking charges of persons arrested, *Newspapers, Inc. v. Brier* 89 Wis. 2d 417, 279 N.W.2d 179 (1979); and general information from personal records of university employees, *State ex rel. Newsome v. Alrid* 90 N.M. 790, 568 P.2d 1236 (1977).

There is one general class of papers which the courts have consistently held may be exempted from disclosure. They involve investigative reports which contain information given by private citizens in confidence. Using a reasoning similar to that justifying evidentiary privileges, courts have held that release of such reports would deter people from supplying information on misconduct. For example, in *Wayside Farm Inc. v. State of Ohio* 50 Ohio Misc. 13 364 N.E.2d 297 (C.P. Summit Co. 1977) the court ruled that complaint letters written to the Ohio Department of Health about nursing homes should not be disclosed. See also, *City Council of Santa Monica v. Superior Court*, *supra*.

Conversely, where the question has been concerning how public funds are being spent, courts have almost always ruled in favor of disclosure. Such a consideration was part of the justification for disclosing the material in *Coldwell v. Board of Public Works*, *supra*. It was the paramount reason for the decision in *Hastings and Sons Public Co. v. City Treasurer*, *supra*. Finally, in *State ex rel. Plain Dealer Pub. Co. v. Krouse* 51 Ohio St. 2d 1, 364 N.E.2d 854 (1977) it provided the primary justification for releasing Remittance Advice Forms which were sent with state warrants to providers of medical care in workmen's compensation cases.

It is the opinion of this office that a balancing of the interests involved would clearly result in the public disclosure of Medicaid cost reports and audit reports. The citizens of the State of Idaho spend large sums of money through the Medicaid program on long-term care facilities. They have a right to know

what that money is buying and whether the program is being effectively administered. Only by examining the cost reports and audit reports can citizens answer those questions. On the other hand, there is no reason to believe that the release of those reports would impair the efficiency or cause undue interference with the administration of the program. There is a certain privacy interest on the part of the facility at stake since the cost reports and audit reports state what costs the facility incurred for various classes of services and property. However, that interest is clearly insufficient to overcome the general public policy in favor of disclosure when the expenditure of huge sums of public monies is involved. The disclosure of such records is a price of doing business with a public entity.

One final issue must be addressed. The department has not been releasing cost reports and audit reports in the past based on an informal legal memorandum written in 1976. Presumably, the facilities are now submitting cost reports with the expectation they will not be released to the public. However, a review of that 1976 memorandum indicates that it was poorly reasoned and now out-of-date. It based its reasons for not disclosing audit reports on federal regulations concerning the Medicare program. Those regulations are not applicable to the Medicaid program. Furthermore the Medicare regulations have since been amended to specifically provide for public disclosure of such reports. See 20 CFR 422.435. That new regulation has been challenged on the grounds that it infringed on the privacy interests of facilities and was upheld. *St. Josephs Hospital Health Center v. Blue Cross of Central New York* 614 F.2d 1290 (2nd Cir. 1979) affirming without opinion U.S. Dist. Ct., NDNY decision of July 11, 1979, cert. denied U.S. Supreme Court No. 79-1161 April 14, 1980. *Parkridge Hospital Inc. v. Califano* U.S. Court of Appeals, Sixth Cir. Nos. 77-1576 and 78-3171, Apr. 19, 1980, *Humana of Virginia Inc. dba St. Lukes Hospital v. Blue Cross of Virginia* U.S. Court of Appeals, Fourth Cir. No. 78-1857, May 9, 1980.

The fact that facilities have been submitting their cost reports in the belief that they would not be released does not alter the result set forth above. If the mere promise by the agency to keep the information confidential was allowed to justify nondisclosure, public disclosure statutes could become meaningless. As stated in *State ex rel. Newsome v. Alarid, supra*, "*The promise of confidentiality standing alone would not suffice to preclude disclosure. The promise would have to coincide with reasonable justifications, based on public policy, for refusing to release the records.*" See also *Popodopoulos v. State Board of Higher Education* 8 Or. App. 445, 494 P.2d 260 (1972).

AUTHORITIES CONSIDERED:

1. *United States Code*: 42 USC 1396 et seq.
2. *Code of Federal Regulations*: 42 CFR 300 et seq. 20 CFR 422.435.
3. *Idaho Code*: §9-301; §9-311; §56-201; §56-202; §56-209b; §56-221; §56-222; §59-1009; §67-5751.
4. *Rules and Regulations of the Department of Health and Welfare*: Title 3, Chapter 10; Title 5, Chapter 1; Title 6, Chapter 1.
5. Opinions of Attorney General of Idaho No. 77-52 dated August 24, 1977.

6. Opinions of the Attorney General of Florida of April 10, 1980.
7. Opinions of the Attorney General of Ohio Opinion No. 76-011, (Feb. 24, 1976).
8. 66 Am. Jur. 2d *Records and Recording Laws*, Section 19.
9. *Twilegar v. Harris*: Fourth Judicial District for Ada County Case No. 72524 Memorandum Decision (Sept. 30, 1980).
10. *Mac Ewan v. Holm*: 226 Or. 27, 359 P.2d 413 (1961).
11. *Linder v. Eckard*: 261 Iowa 216 152 N.W.2d 833 (1967).
12. *City Council of City of Santa Monica v. Superior Court*: 204 Cal. App. 2d 68, 21 Cal. Rptr. 896 (Ct. App. 2nd Dist., 1962).
13. *Coldwell v. Board of Public Works*: 187 Cal. 510, 202 P. 879 (1921).
14. *Lopez v. Fitzgerald*: 76 Ill. 2d 107, 390 N.E.2d 835 (1979).
15. *Hastings and Sons Pub. Co. v. City Treasurer*: 78 Mass. Adv. Sh. 920 375 N.E.2d 299 (1978).
16. *Newspapers, Inc. v. Brier*: 89 Wis. 2d 417 279 N.W.2d 179 (1979).
17. *State ex rel. Newsome v. Alarid*: 90 N.M. 790, 568 P.2d 1236 (1977).
18. *State ex rel. Plain Dealer Pub. Co. v. Krouse*: 51 Ohio St. 2d 1, 364 N.E.2d 854 (1977).
19. *St. Josephs Hospital Health Center v. Blue Cross of Central New York*: 614 F.2d 1290 (2nd Cir., 1979) affirming without opinion U.S. Dist. Ct., NDNY decision of July 11, 1979 cert. denied U.S. Supreme Court No. 79-1164 April 14, 1980.
20. *Parkridge Hospital Inc. v. Califano*: U.S. Court of Appeals, Sixth Cir. Nos. 77-1576 and 78-3171, April 19, 1980.
21. *Humana of Virginia Inc. dba St. Lukes Hospital v. Blue Cross of Virginia*: U.S. Court of Appeals, Fourth Cir. No. 78-1857, May 9, 1980.
22. *Popodopoulos v. State Board of Higher Education*: 8 Or. App. 445 494 P.2d 260 (1972).
23. *Wayside Farm, Inc. v. State of Ohio*: 50 Ohio Misc. 13, 364 N.E.2d 297 (C.P. Summit Co., 1977).

DATED this 7th day of January, 1981.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

DHL/SRV/mf

ANALYSIS BY:

STANLEY R. VOYLES
Deputy Attorney General
Health and Welfare Division

cc: Idaho Supreme Court
Idaho State Library
Idaho Supreme Court Law Library

ATTORNEY GENERAL OPINION NO. 81-2

TO: Jim C. Harris
Ada County Prosecuting Attorney
103 Courthouse
Boise, Idaho 83702

Per Request for Attorney General Opinion

QUESTIONS PRESENTED:

1. Does the grand jury system as established by Rule 6 of the Idaho Criminal Rules take precedence over the procedures contained within Title 19 of the *Idaho Code* because of the Supreme Court's inherent right to establish procedure by rule?
2. Is it possible, pursuant to case law or statutory interpretation, that regardless of the use of a grand jury for purposes of indictment, that a preliminary hearing might still be required based upon the indictment document prior to a trial setting in District Court?
3. Are the limitations and prerequisites relating to grand jury procedure that are contained in *Idaho Code* §19-1109 mandatory or is Rule 6 of the Idaho Criminal Rules sufficiently discretionary so that the prosecutor can have the grand jury inquire only into one case or a group of cases surrounding one factual circumstance such as the riot at the Idaho State Penitentiary?

CONCLUSIONS:

1. Yes, the grand jury system as established by Rule 6 of the Idaho Criminal Rules takes precedence over the procedures contained within Title 19 of the *Idaho Code* wherever any conflict in the two systems appears, but provisions of Title 19 are still valid wherever a reasonable construction of the statutes shows them not to be in conflict with Rule 6.
2. No, if a grand jury indictment is returned against a defendant, there is no requirement that a preliminary hearing based upon the indictment document then be held prior to a trial setting in district court.
3. The limitations and prerequisites relating to grand jury procedure contained in *Idaho Code*, §19-1109, are mandatory and Idaho Criminal Rule 6

gives no discretion which would permit the prosecutor to inquire only into one case or into a group of cases surrounding one factual circumstance such as the riot at the Idaho State Penitentiary by the use of a grand jury.

ANALYSIS:

1. Presently in existence in Idaho are two separate schemes regulating the use of the grand jury. They are contained in *Idaho Code*, Title 19, primarily in Chapters 10, 11 and 12, and also contained in Rule 6 of the Idaho Criminal Rules. The two schemes are very similar in their coverage with the statutory scheme containing the more detailed procedures. While the overlap between the two is significant, they do not appear to contradict each other although each deals with some areas not covered by the other. The logical question which then arises and which is the subject of this section of the analysis is which one of the two schemes should be the one to control grand jury procedure? The Idaho Supreme Court has long held that it has an inherent power to formulate rules of practice and procedure within the courts of Idaho. *State v. Knee*, S. Ct. Op. No. 138, (Sept. 3, 1980); *State v. Griffith*, 97 Idaho 52, 58, 539 P.2d 604 (1975); *State v. Yoder*, 96 Idaho 651, 654, 534 P.2d 771 (1975); *R.E.W. Construction Co. v. Dist. Ct. of the Third Judicial Dist.*, 88 Idaho 426, 438, 400 P.2d 390 (1965).

This power was also recognized by the Idaho legislature when it enacted *Idaho Code*, §§1-212 through 1-215. This is made clear by §1-212, which states: "The inherent power of the Supreme Court to make rules governing procedure in all the courts of Idaho is hereby recognized and confirmed." The problem of how to deal with statutes that conflict with court adopted procedural rules was also dealt with by the legislature in these statutory sections. In §1-215, it was provided that:

Such rules, when adopted by the said Supreme Court shall take effect six months after their promulgation and thereafter all laws in conflict therewith shall be of no further force or effect.

The validity of this statutory principle which invalidated laws in conflict with court procedural rules was recognized by Idaho's Supreme Court in several cases. *Allen Steel Supply Co. v. Bradley*, 89 Idaho 29, 43-44, 402 P.2d 394 (1965); *R.E.W. Const. Co. v. Dist. Ct. of the Third Judicial Dist.*, *supra*, at 438-440. See also, *Mountain States Implement Co. v. Sharp*, 93 Idaho 231, 233, 459 P.2d 1013 (1969); *Lawrence Warehouse Co. v. Rudio Lumber Co.*, 89 Idaho 389, 397, 405 P.2d 634 (1965) (both cases holding statutes have no further force and effect to the extent that the statutes conflict with I.R.C.P.).

The only limits apparently put on this power of the court is that any such rules adopted by the court cannot contradict constitutional provisions, *State v. Badger*, 96 Idaho 168, 170, 525 P.2d 363 (1974), and that the rules adopted shall not "abridge, enlarge or modify the substantive rights of any litigant." *Idaho Code*, §1-213.

However, in 1975, the legislature repealed *Idaho Code*, §1-215, and numerous other sections of the *Idaho Code* dealing with rules of civil procedure. 1975 Idaho S. L., Ch. 242, p.651. The enactment repealing that provision stated it was "to repeal procedural statutes in conflict with or covered by rules adopted by the Idaho Supreme Court on procedural matters." The question naturally arising is whether the legislature by (1) taking an affirmative step in repealing

statutes conflicting with court rules and (2) by repealing the statute (I.C. §1-215), which automatically repealed statutes in conflict with court adopted rules, was intending to take this power away from the Supreme Court and give it to themselves. The "Statement of Purpose" which accompanied this bill in its introduction to the state legislature makes it clear that this was not the intention of the legislation. Rather, the "Statement of Purpose" recognized that statutes conflicting with procedural rules are automatically repealed.

STATEMENT OF PURPOSE:

Senate Bill No. 1042

On January 1, 1975, the new Idaho Rules of Civil Procedure became effective by Order of the Supreme Court. The new rules bring together and clarify all of the procedures governing the trial of civil actions.

For over 20 years prior to January 1, 1975, statutes and rules had been enacted regarding these procedures, often in conflict with each other. This bill would repeal all of the statutes which conflict with or are outdated by the new civil rules.

In the case of *R.E.W. Construction, Co. v. District Court*, 88 Idaho 426 (1965), the Supreme Court has held that in the case of a conflict between a procedural rule and a procedural statute, that the rule supersedes the statute. Thus, by adoption of the new rules of civil procedure, the statutes sought to be repealed by this bill have been superseded by the rules. However, by repealing the old statutes, the Legislature would eliminate much confusion which would ensue if the statutes were to remain in the *Code*.

Shortly after the passage of this legislation the Idaho Supreme Court in the case of *State v. Griffith, supra*, made it clear that it was unnecessary for the state legislature to take such affirmative action to repeal conflicting statutes. There the court stated:

While the legislature has authorized this court to formulate rules of procedure, this court has the inherent authority, made especially clear by the amended provisions of Article 5, Section 2, of the Idaho Constitution, to make rules governing procedure in the lower courts of this state. [Citations omitted]. *The legislature need not repeal statutes made unnecessary by, or found in conflict with, court reorganization and integration.* It is well settled in this state, as part of the rule-making power possessed by this Court, that *the Court may by rule, . . . make inapplicable procedural statutes which conflict with our present court system.* *State v. Griffith*, 97 Idaho at 58 [Emphasis added].

More recently in the case of *State v. Lindner*, 100 Idaho 37, 592 P.2d 852 (1979), the court, in a footnote, again recognized that court procedural rules control to the exclusion of any conflicting statutes. *Id.*, n.5 at 42.

However, the case law also seems to indicate that statutes covering procedural rules will only be repealed if they are in conflict with court adopted procedural rules. If they cover different areas which don't conflict with the rules or merely supplement the rules, then the statutes retain their force and effect.

This is because the law does not favor repeal by implication, and where earlier and later acts are not necessarily in conflict and may be reconciled by reasonable construction, no repeal results. *Idaho Wool Marketing Assn. v. Mays*, 80 Idaho 365, 371, 330 P.2d 337 (1958). Such a situation arose in the case of *State v. Jennings*, 95 Idaho 724, 518 P.2d 1186 (1974). In that case a statute was in apparent conflict with one of the Idaho Criminal Rules. The court interpreted the statute so that its effect was consistent with the criminal rule and held that: "This Court will not nullify any statutory provision or deprive it of its potency, if a reasonable construction of the statute is possible." *Id.* at 726.

Thus, the court clearly has the power to adopt procedural rules. As stated earlier, however, the court cannot adopt rules which would affect the substantive rights of a litigant. *Idaho Code*, §1-213. The final step in resolving the question thus is to determine whether Rule 6 is procedural or substantive in nature. If procedural, it would control to the exclusion of conflicting portions of Title 19, but if substantive, then it would be invalid under the court's rule making power.

The difference between procedure and substance has never been clearly defined by the Idaho Supreme Court, but Justice Bistline's dissent in *State v. Kne*, S. Ct. Op. 138 (Sept. 3, 1980), is instructive in this regard:

Procedure determines the manner in which a case moves through the courts. Rules which structure the order of appearance of parties, designate time for filing and dictate the manner in which arguments and motions are to be presented are procedural rules and clearly within the power of this court to adopt. Slip opinion at 15 [Citations omitted].

Also, the United States Supreme Court had the opportunity to interpret a federal statute similar to *Idaho Code*, §§1-212 through 1-215, in the case of *Sibbach v. Wilson & Co.*, 312 U.S. 1, 85 L. Ed. 479 (1940). There the court stated that "substantive rights" are those "rights conferred by law to be protected and enforced in accordance with the adjective law of judicial procedure," 312 U.S. at 13, and that the test for determining the difference between procedure and substance was as follows:

The test must be whether a rule really regulates procedure, — the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them. 312 U.S. at 14.

Rule 6, in its various sections, provides for the summoning of the grand jury, the selection of and qualifications of the jurors, who may be present during the proceedings, the evidence the jury can hear, the indictment and the jury's discharge. It simply regulates the grand jury process from beginning to end. The Idaho Constitution only provides that prosecution be by way of a grand jury indictment or by an information. Idaho Constitution, Article 1 §8. Since Rule 6 only sets out the rules for a grand jury proceeding when one is used, it clearly appears only to be a rule of procedure rather than having any effect on a litigant's substantive rights.

Thus, in conclusion to question one, since Rule 6 is one of procedure, the grand jury system as established by Rule 6 of the Idaho Criminal Rules takes precedence over the procedures contained within Title 19 of the *Idaho Code*

wherever any conflict in the two systems appears. However, provisions of Title 19 are still valid wherever a reasonable construction of the statutes shows them not to be in conflict with Rule 6.

2. This question asks whether a preliminary hearing is still required prior to a trial setting if a grand jury has indicted a defendant. The Idaho Constitution, in Article 1, §8, states the controlling law as to when a preliminary hearing is required. That section states:

Prosecutions only by indictment or information. — *No person shall be held to answer for any felony or criminal offense of any grade, unless on presentment or indictment of a grand jury or on information of the public prosecutor, after a commitment by a magistrate, except in cases of impeachment, in cases cognizable by probate courts or by justices of the peace, and in cases arising in the militia when in actual service in time of war or public danger; provided, that a grand jury may be summoned upon the order of the district court in the manner provided by law, and provided further, that after a charge has been ignored by a grand jury, no person shall be held to answer, or for trial therefor, upon information of the public prosecutor.* [Emphasis added].

In addition to this constitutional provision, the *Idaho Code*, in Title 19, Chapters 5 and 8, and Idaho Criminal Rule 5.1, also sets out provisions for preliminary hearings. However, neither the statutes nor the rule answer the question to be resolved in this opinion.

The rule governing the preliminary hearing would control to the exclusion of the conflicting statutes as discussed in the first section of this opinion. That rule simply states, in relevant part, that: "A defendant, when charged with any felony, is entitled to a preliminary hearing . . ." I.C.R. 5.1. The rule does not distinguish whether a preliminary hearing is required for a prosecution brought by way of indictment or information or both. However, it must be recalled that the court is powerless to adopt any rules which would conflict with constitutional provisions. *State v. Badger, supra*, at 170. Thus, the constitutional section dealing with preliminary hearings (Article 1, §8), would control to the exclusion of both the statutes and the rule as to whether a preliminary hearing is required after a grand jury indictment.

The Idaho Supreme Court has on several occasions interpreted the requirements derived from the wording of Article 1, §8. One of the earliest decisions was that of *State v. West*, 20 Idaho 387, 118 P. 773 (1911). In that case the defendant argued that the district court had no jurisdiction over her since she had never been accorded a preliminary examination and had never been indicted by a grand jury. In reversing her conviction the court held:

In harmony, therefore, with the provisions of Section 8, Article 1, of the constitution, it was necessary that the appellant herein be accorded her constitutional right of *either a preliminary examination or presentment or indictment by a grand jury* before she could lawfully be placed upon trial in the district court for the offense with which she is charged in this case. 20 Idaho at 392 [Emphasis added].

Although the court did not specifically rule on whether a preliminary hearing is required after a grand jury indictment, the use of the wording "either / or" indicates that both would not be required. More recently in the case of *Col-*

lins v. Crowley, 94 Idaho 891, 499 P.2d 1247 (1972), the court had to decide "the issue of whether, following abolition of the justice of the peace and probate courts, a person accused of a misdemeanor can be tried on the charge without first having either a preliminary examination or presentment of the charges to a grand jury." *Id.* at 892. [Emphasis added]. Once again, the court was not ruling on the same question as this opinion, but the language used by the court seems to indicate that there is to be either a preliminary examination or a grand jury proceeding. This is again reflected by the wording of the court's holding when it was determining whether these procedures must be used for both misdemeanors and felonies:

Of course, cases which are of a more serious nature . . . must be prosecuted either by the grand jury procedure or by commitment following preliminary examination before a magistrate. 94 Idaho at 895.

Even more enlightening in the *Collins* case was the court's discussion of the intent of the framers of the constitution in the drafting of this provision:

During the constitutional convention which proposed the Idaho Constitution, adopted in 1890, there was a great deal of debate over how this particular provision should be worded. The debate concerned *whether the procedure employing the use of an "information" following preliminary examination was a proper method of charging an accused of a crime, or whether the better practice would be for all such prosecutions to be had only following indictment by a grand jury.* Throughout the debate on this provision the principal issue was the method of prosecution of the more serious crimes, and no substantial question was ever raised over the prosecution of the lesser crimes by way of simple criminal complaint which deletes the screening process of a grand jury or a preliminary examination before a magistrate. 94 Idaho at 893-894 [Emphasis added].

Finally, the court has most recently ruled on this section of the constitution in *Gibbs v. Shaud*, 98 Idaho 37, 557 P.2d 631 (1976). There the issue was whether a person charged with a criminal offense of lesser degree than a felony is entitled to a preliminary examination. Again, the language used by the court is applicable to the question in this opinion:

The initial clause and phrases of Idaho Constitution, Article 1, §8, created a guarantee that an accused will have to answer a criminal charge only *after either a grand jury presentment or indictment, or upon an information by a prosecuting attorney following a magistrate's commitment based on conduct of a preliminary examination.* 98 Idaho at 38 [Emphasis added].

....

The constitutional provision (Idaho Constitution, Article 1, §8) classified crimes into two categories, i.e., those where a grand jury indictment or preliminary examination were required; and those where none was required . . . 98 Idaho at 39 [Emphasis added].

Thus, it must be concluded on the basis of the above law, that if a grand jury indictment is returned against a defendant that there is no requirement that a preliminary hearing based upon the indictment document then be held

prior to a trial setting.¹ It is within the state's discretion to proceed either by way of a grand jury indictment or by way of an information following a preliminary examination.

3. This question asks whether the requirements set out in *Idaho Code*, §19-1109, which detail the matters into which the grand jury must inquire, are mandatory or whether Rule 6 is sufficiently discretionary so as to allow inquiry into only one case or a group of cases surrounding one factual circumstance. The statute in question provides as follows:

Matters of inquiry. — The grand jury must inquire into the case of every person imprisoned in the jail of the county, on a criminal charge and not indicted; into the condition and management of the public prisons within the county; and into the wilful and corrupt misconduct in office of public officers of every description, within the county. *Idaho Code*, §19-1109.

Thus, if the prosecutor convenes the grand jury for the purpose of investigating the circumstances surrounding the Idaho State Penitentiary riot, can he limit the grand jury's inquiry to that matter or must the grand jury also inquire into the additional matters detailed in *Idaho Code*, §19-1109?

In general, the duty of the grand jury is to inquire diligently into all offenses which come to its knowledge, whether from the court, the prosecuting attorney, or any other source. 38 Am. Jur. 2d *Grand Jury* §27 at 972. If there are any statutes detailing what should be investigated by a grand jury, they are controlling. *Id.* §28 at 973. The purposes of this policy were aptly stated by the Supreme Court in *Hale v. Henkel*, 201 U.S. 43, 50 L. Ed. 652, 26 S. Ct. 370 (1906), disapproved on other grounds *Murphy v. Waterfront Com. of New York Harbour*, 378 U.S. 52, 12 L. Ed. 2d 678, 84 S. Ct. 1594 (1964). There the court said that the jury is not appointed for the prosecutor or for the court; it is appointed for the government and the people; and both the government and the people are surely concerned, on the one hand, that all crimes, whether given or not given in charge to the grand jury and whether described or not described with professional skill, should receive the punishment which the law denounces. 201 U.S. at 61.

It is for this reason that in many states the grand jury has plenary inquisitorial powers and can originate charges against offenders and although it may call on the court for advice, or on the district attorney for assistance, it is empowered to institute and initiate, as well as to manage and control, investigations without any interference or hindrance from either the court or district attorney. 38 C.J.S. *Grand Juries* §34(d) at 1031-1032.

The Idaho Legislature has expressly set forth the areas the grand jury is required to investigate in *Idaho Code*, §§19-1101 and 19-1109. Section 19-1109 was cited earlier and §19-1101 simply states:

¹It is important to note one of the limitations of this aspect of the opinion. It does not apply to a situation where an accused has been taken into custody prior to any other proceeding. In that situation, even if it is planned to use a grand jury proceeding, the accused has a right to a preliminary hearing prior to that time. "The Idaho Constitution guarantees an accused's right to a preliminary hearing before a magistrate and, afterwards, to be prosecuted by information or the presentment or indictment of a grand jury." *Carey v. State*, 91 Idaho 706, 710, 429 P.2d 836 (1967). Note also that *Idaho Code*, §19-1308, mandates that no information can be filed against any person until that person has had a preliminary examination.

Powers and duties in general. — The grand jury must inquire into all public offenses committed or triable within the county, and present them to the court, either by presentment or by indictment.

These statutory sections are not unique in the law, having been enacted in other jurisdictions. See for examples the statutes and cases appearing in 38 C.J.S. *Grand Juries* §34(b) at 1030; 106 A.L.R. 1383, 1387 (matters within investigating power of grand jury). The wisdom of selecting the grand jury as the body to investigate such areas has been recognized because of the method of their deliberations and the secrecy surrounding them. *Petition of McNair*, 187 A. 498, 504, 324 Pa. 48 (1936).

Even though these statutes listing the grand jury's duties of inquiry speak in mandatory terms, these areas need not always be critically examined. As was stated in one case which construed a statute identical to *Idaho Code*, §19-1109:

There is a legal presumption that public officers perform the duties required of them by law, and while grand juries are commanded to inquire into "willful and corrupt misconduct of public officers," such duty is to be performed in the light of such presumption. *Stone v. Bell*, 129 P. 458, 459, 35 Nev. 240 (1912).

Thus, although the *scope* of the investigation in these areas is up to the grand jury, it is outside the court's or the district attorney's powers to control the *areas* of inquiry when such are prescribed by statute.

The question which next naturally arises is what effect Rule 6 might have on these statutory sections since it also deals with the grand jury. Specifically, do the provisions of Rule 6 preempt the operation of §19-1109 so that the prosecutor has the discretion to convene the grand jury for a specific investigation?

Initially, it should be noted that there is no mandatory provision for the use of a grand jury in the Idaho Constitution. The only reference to the grand jury occurs in Article 1 §8, which was cited previously in this opinion. That section simply states that in general a grand jury indictment or an information filed by the prosecutor are prerequisites to a criminal prosecution.

Rule 6 of the Idaho Criminal Rules, which covers the proceedings of the grand jury from its summoning to its discharge, makes no mention at all of areas of inquiry for a grand jury. The only law detailing the grand jury's duties of inquiry are statutory and contained in Chapter 11 of Title 19 of the *Idaho Code*, of which §19-1109 is a part. Although some parts of Chapter 11 are implicitly superseded by Rule 6 because they cover the same areas as Rule 6 (see, e.g. §§19-1104, 19-1105, 19-1106, 19-1107, 19-1111, and 19-1112), the provisions regarding the areas of inquiry (§§19-1101 and 19-1109), are not covered within the rules. Recalling the discussion in the first question of this opinion which concluded that statutes are only repealed when they conflict with rules, such statutory provisions regarding the grand jury's duties of inquiry remain in effect. Further, since Rule 6 does not attempt in any way to control or change the grand jury's scope of inquiry, no discretion should be inferred from the rule to limit the grand jury's statutory duties of inquiry.

Thus, in conclusion to this aspect of the opinion, the limitations imposed by *Idaho Code*, §19-1109, relating to the scope of the grand jury's inquiry are

mandatory in nature and the prosecutor cannot, under Rule 6 of the Idaho Criminal Rules, convene a grand jury to investigate only one case or a group of cases surrounding one factual circumstance. The grand jury, when convened, has a duty to also inquire into those areas covered by *Idaho Code*, §19-1109.

AUTHORITIES CONSIDERED:

1. *State v. Knee*, S. Ct. Op. #138 (Sept. 3, 1980).
2. *State v. Griffith*, 97 Idaho 52, 58, 539 P.2d 604 (1975).
3. *State v. Yoder*, 96 Idaho 651, 654, 534 P.2d 771 (1975).
4. *R.E.W. Construction Co. v. Dist. Ct. of the Third Judicial Dist.*, 88 Idaho 426, 438, 400 P.2d 390 (1965).
5. *Allen Steel Supply Co. v. Bradley*, 89 Idaho 29, 43-44, 402 P.2d 394 (1965).
6. *Mountain States Implement Co. v. Sharp*, 93 Idaho 231, 233, 459 P.2d 1013 (1969).
7. *Lawrence Warehouse Co. v. Rudio Lumber Co.*, 89 Idaho 389, 397, 405 P.2d 634 (1965).
8. *State v. Badger*, 96 Idaho 168, 170, 525, P.2d 363 (1974).
9. *State v. Lindner*, 100 Idaho 37, 592 P.2d 852 (1979).
10. *Idaho Wool Marketing Assn. v. Mays*, 80 Idaho 365, 371, 330 P.2d 337 (1958).
11. *State v. Jennings*, 95 Idaho 724, 518, P.2d 1186 (1974).
12. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 85 L. Ed. 479 (1940).
13. *State v. West*, 20 Idaho 387, 118 P. 773 (1911).
14. *Collins v. Crowley*, 94 Idaho 891, 499 P.2d 1247 (1972).
15. *Gibbs v. Shaud*, 98 Idaho 37, 557 P.2d 631 (1976).
16. *Carey v. State*, 91 Idaho 706, 710, 429 P.2d 836 (1967).
17. *Hale v. Henkel*, 201 U.S. 43, 50 L. Ed. 652, 26 S. Ct. 370 (1906).
18. *Petition of McNair*, 187 A. 498, 504, 324 Pa. 48 (1936).
19. *Stone v. Bell*, 129 P. 458, 459, 35 Nev. 240 (1912).
20. *Idaho Code*, §§1-212 - 215; 19-1101, 19-1104 - 1107, 19-1109, 19-1111 - 1112; 19-1308.
21. *Idaho Constitution*, Article 1 §8.

22. I.C.R. Rules 5.1, 6.
23. Idaho S.L. (1975), Ch. 242, p.651.
24. 38 Am. Jur. 2d *Grand Jury* §27, p.972.
25. 38 C.J.S. *Grand Juries* §34(d), pp.1031-1032; §34(b), p.1030.
26. 106 A.L.R. 1383, 1387.

DATED this 19th day of January, 1981.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

DHL/LDC/lb

ANALYSIS BY:

LANCÈ D. CHURCHILL
Deputy Attorney General
State of Idaho

cc: Idaho State Library
Idaho Supreme Court
Idaho Supreme Court Library

ATTORNEY GENERAL OPINION NO. 81-3

TO: The Honorable Reed Budge
President Pro-Tem
Idaho State Senate

Per Request for Attorney General Opinion

QUESTIONS PRESENTED:

1. In addition to Congressional statute, is state legislative action required to authorize the creation of and appointment to the office of Idaho Council Member for the Pacific Northwest Electric Power and Conservation Planning Council?

2. With or without state legislative action by what legally proper process may appointments to the Council be made?

CONCLUSION:

1. State legislative action, in the form of statutorily creating the office of Pacific Northwest Electric Power Planning and Conservation Council Member, is a necessary prerequisite to a state's membership appointments and to participation in the Council.

2. If the Legislature chooses to create Council offices by statute, it has the constitutional prerogative of detailing the method of appointment thereto, including what legal entity shall make the appointment and whether the appointment shall be subject to legislative confirmation. If the Legislature creates the Council offices and is silent on the mode of appointment, then a vacancy exists in the office which is filled by gubernatorial appointment *without* senate confirmation.

ANALYSIS:

On December 5, 1980, President Carter signed into law the Pacific Northwest Electric Power Planning and Conservation Act, Public Law 96-501. The Act was a congressional response to problems associated with the use of and demand for federal electrical energy resources in the Pacific Northwest. We believe that a brief history of federal electric power development and use in this region is an appropriate point from which to begin our discussion and analysis of the legal issues you have posed. Several congressional committee reports have been utilized in the preparation of the following summary.

The Bonneville Power Administration (BPA) was established in 1937 by the Bonneville Project Act, 16 U.S.C. 832, et seq. The Act empowered the Administrator of the Bonneville Power Administration to dispose of the electric power produced by dams on the Columbia River and its tributaries constructed and operated by the Army Corps of Engineers. BPA was not authorized by the Act to develop and build generation facilities, but the Corps of Engineers and the Bureau of Reclamation were so authorized.

A subsequently enacted federal statute, Public Law 88-552, mandates that BPA market power on a priority basis to public bodies and cooperatives. These "preference customers" include municipal and other publicly owned cooperative power systems throughout the Pacific Northwest. In addition to preference customers, BPA markets power to various federal agencies, investor-owned systems and certain direct service industrial customers who include several major aluminum and chemical companies in the States of Oregon and Washington.

In 1976, BPA determined that power demand and supply projections clearly indicated that federal power would soon start running short of projected need. Notice of insufficiency was given to preference customers indicating that their load growth could not be met with BPA power past 1983. Competing demands for federal power had reached the critical stage.

In 1977 Congress started the process of identifying the economic, political, administrative and legal problems associated with the development, distribution and use of BPA power in the Pacific Northwest. After three years of deliberation, the Congress passed, and the President signed, the Pacific Northwest Electric Power Planning and Conservation Act in late 1980.

In brief, the major provisions of that Act and the corresponding sections of it are:

1. The Bonneville Power Administration is to continue its historical role of transmitting and marketing federal power. BPA is now, however, mandated to acquire all necessary energy resources sufficient to serve those utilities who choose to apply to BPA for wholesale power

supplies. Participating utilities, public and private, will be integrated into the overall planning and delivery system contemplated by the Act. §4 (5) (b) (1).

2. A regional agency, known as the Pacific Northwest Electric Power and Conservation Planning Council, is to be created with its membership composed of two persons from each of the States of Idaho, Montana, Oregon and Washington. §4 (a). Within two years after its establishment, the Council is to prepare and adopt for transmission to the BPA administrator a regional conservation and electric power plan. §4 (5) (B) (c) (13) (d) (1). The plan is to outline methods by which the BPA, the region's public and private utilities, and state and local governments are to establish energy conservation programs and assist in the development of renewable energy resources. §4 (5) (B) (e) (2). To be included in the plan is a 20-year power demand forecast for the region. §4 (5) (B) (e) (3).

3. Direct service industries will receive new 20-year contracts for BPA power at a higher rate than currently existing. From the Act's effective date, no new direct service industries will be allowed to purchase BPA power. §5 (B) (3).

4. Existing statutory supply guarantees for preference customers, i.e. co-ops and public-owned utilities, are protected. §5 (a).

5. BPA is authorized to purchase additional energy resources from any source, provided that first preference is given to conservation and renewable resources. §6.

Having given this brief historical background on Northwest federal energy programs and the new federal Act, we turn now to an analysis of the first question you have posed to us for resolution.

You have asked whether state legislative action is necessary to effectuate the appointment of this state's membership to the Pacific Northwest Electric Power and Conservation Planning Council?

Our analysis of this question necessarily begins by characterizing the legal nature of the membership positions on the Council. It is our opinion that members of the Council are to be characterized as officers, not mere public employees. This opinion is based upon a generally accepted definition of civil office:

A civil office is an office that pertains to the exercise of the powers or authority of civil government. *It is a grant and possession of the sovereign power; and the exercise of such power within the limits prescribed by law which creates the office constitutes the discharge of the duties of the office.* A civil officer is a term embracing such officers in which part of the sovereignty or municipal regulations, or the general interests of society are vested. (Emphasis added). 67 C.J.S. *Officers*, §5, p.228.

We believe that the Act contemplates that a portion of the sovereign power of the State of Idaho will be vested in and exercised by the Council members from this state. They will be empowered to speak on behalf of all the citizens of the state and its duly constituted government. They will exercise important powers and

prerogatives in energy planning and wildlife enhancement. In short, they will exercise the rights, duties and responsibilities commonly and historically accorded to persons who are legally denominated "civil officers".

Second, one must determine whether these "civil officers" are to be classified as federal or state officers. The process of making this determination should begin with a review of the relevant portions of the new federal Act relating to the Council and its membership.

Section 4 (a), subsections (1), (2) and (3) are the relevant portions of the Act in this analysis:

Sec 4. (a) (1) The purposes of this section are to provide for the prompt establishment and effective operation of the Pacific Northwest Electric Power and Conservation Planning Council, to further the purposes of this Act by the Council promptly preparing and adopting (A) a regional conservation and electric power plan and (B) a program to protect, mitigate, and enhance fish and wildlife, and to otherwise expeditiously and effectively carry out the Council's responsibilities and functions under this Act.

(2) To achieve such purposes and facilitate cooperation among the States of Idaho, Montana, Oregon, and Washington, and with the Bonneville Power Administration, the consent of Congress is given for an agreement described in this paragraph and not in conflict with this Act, pursuant to which —

(A) there shall be established a regional agency known as the "Pacific Northwest Electric Power and Conservation Planning Council" which

(i) shall have its offices in the Pacific Northwest, (ii) shall carry out its functions and responsibilities in accordance with the provisions of this Act, (iii) shall continue in force and effect in accordance with the provisions of this Act, and (iv) except as otherwise provided in this Act, shall not be considered an agency or instrumentality of the United States for the purpose of any Federal law; and (B) *two persons from each State may be appointed, subject to the applicable laws of each such State, to undertake the functions and duties of members of the Council.*

The State may fill any vacancy occurring prior to the expiration of the term of any member. The appointment of six initial members, subject to applicable State law, by June 30, 1981, by at least three of such States shall constitute an agreement by the States establishing the Council and such agreement is hereby consented to by the Congress. Upon request of the Governors of two of the States, the Secretary shall extend the June 30, 1981, date for six additional months to provide more time for the States to make such appointments.

(3) Except as otherwise provided by State law, each member appointed to the Council shall serve for a term of three years, except that, with respect to members initially appointed, each Governor shall designate one member to serve a term of two years and one member to serve a term of three years. The members of the Council shall select from among themselves a chairman. *The members and officers and employees of the Council shall not be deemed to be officers or employees of the*

United States for any purpose. The Council shall appoint, fix compensation, and assign and delegate duties to such executive and additional personnel as the Council deems necessary to fulfill its functions under this Act, taking into account such information and analyses as are, or are likely to be, available from other sources pursuant to provision of this Act. The compensation of the members and officers shall not exceed the rate prescribed for Federal officers in positions at step 1 of level GS-18 of the General Schedule. (Emphasis added.)

The Act clearly states that members, officers and employees of the Council are not “deemed to be officers or employees of the United States for any purpose”. The Act’s explicit articulation that Council officers and employees are not to be construed as federal officers or employees is further buttressed by language found in the House Committee Report accompanying the legislation that ultimately became law:

The arrangement contemplates that state officials on the Council would be authorized to carry out their functions under state law consistent with the scheme of the bill. *Council members are deemed to be employees or officers of their respective states* and are subject to removal, and compensated in accordance with, applicable state law. H.R. Rep. No. 96-976, Part II, 96th Cong., 2nd Sess. 40 (Sept 16, 1980). (Emphasis added).

We believe that the action of the Congress in enacting Public Law 96-501 did not encompass the creation of a “federal” office or offices within the framework of the Council. Our belief is based upon the above articulated language found within the Act and the Committee Report accompanying it. It is further based upon a reading of Article 2, Section 2, Clause 2 of the United States Constitution, which precludes state governments from making appointments to federal offices:

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Since Congress explicitly provided that the Council’s membership would be appointed by the various state governments and not the President or the head of a federal department, as constitutionally mandated in the case of federal offices, we believe that Council officers and employees must be characterized as exercising state authority within the framework of a federal law. Accordingly, in our opinion, the Council’s members are state, not federal, officers.

Since Congress clearly did not contemplate that Council members **would** serve as federal officers, we believe that it conceptually envisioned that the members would serve as officers of the respective states they represent. The previously articulated congressional committee report strongly suggests that this belief is correct:

The arrangement contemplates that state officials on the Council would be authorized to carry out their functions under state law . . . *Council members are deemed to be employees or officers of their respective states . . .*” (Emphasis added) H.R. Rep. No. 96-976, Part II, 96th Cong., 2nd Sess. p.40 (Sept. 16, 1980).

However, the federal government, acting through the Congress, cannot create a state office. The power to establish state offices is reserved to the states by the Tenth Amendment to the United States Constitution. The United States Supreme Court has recognized that each state has the constitutional obligation to establish and operate its own government." "We recognize a state's interest in establishing its own form of government." *Sugarman v. Dougall*, 413 U.S. 634, 643 (1973). The legislative power of a state, except so far as restrained by its own constitution, is absolute with respect to state officers: it may at its pleasure create or abolish them, modify their duties, shorten or lengthen their term, or increase or diminish their salary. *Newton v. Mahoning County*, 100 U.S. 548, 25 L.Ed. 710 (1879). Accordingly, passage of Public Law 96-501 by the Congress could not and did not automatically establish Council member positions as state offices, since the Congress is not constitutionally empowered to do so.

As a general proposition of law, the legislature of a state is constitutionally imbued with the power to create state offices:

A public office can be created or brought into existence by a constitutional or legislative enactment. Accordingly, subject to limitations and restrictions imposed by constitutional provisions, *the legislative branch of the government is vested with the power to create an office . . .* 67 C.J.S. *Officers* §13 (1978).

The above articulated rule is in effect in our state. The Idaho Supreme Court, in *Ingard v. Barker*, 27 Idaho 124, 147 Pac. 293 (1915), has ruled that the Legislature, pursuant to Article 6, Section 6 of the state constitution, is the branch of government constitutionally empowered to create state offices. This authority is in furtherance of the legislature's constitutional prerogative of exercising its plenary power in matters of legislation. *Smylie v. Williams*, 81 Idaho 335, 341 P.2d 451 (1959).

Thus the above analysis and discussion forms the basis for our conclusion that state legislative action, in the form of statutorily creating the Office of Pacific Northwest Electric Power Planning and Conservation Council Member, is a necessary prerequisite to this state's membership appointments to and participation in the Council.

Your second question relates to the process of Council membership appointment. Specifically, you have asked us by what legally proper process Council membership appointments may be made.

The creation of a state office is a condition precedent to the appointment of individuals to it. There must exist an office before an officer *de facto* or *de jure* can be appointed to fill it. *State v. Malcom*, 39 Idaho 185, 193, 226 Pac. 1083 (1924). The appointment issue is moot unless and until the Legislature in this instance actually creates the state office of Council Member. Thus, without legislative authorization no valid membership appointments may be made by any authority. With legislative action the appointment process may proceed.

Article 4, Section 6 of the state constitution provides that the governor is constitutionally authorized to appoint certain officers. In relevant part, that section states:

The governor shall nominate and, by and with the consent of the senate, appoint all officers whose offices are established by this constitu-

tion, or which may be created by law, and whose appointment or election is not otherwise provided for.

In the previously cited case of *Ingard v. Barker*, the Idaho Supreme Court interpreted the above state constitutional provision as meaning that offices created by the Legislature could be filled by appointment by the governor or "by any person, board, corporation or association of individuals" empowered by statute to make the appointment. 27 Idaho at 130. The court stated that the "framers of the constitution could not foresee what offices might be created by laws subsequently enacted, and so then provided that such offices should be filled by the Governor unless the appointment or election should be otherwise provided for." 27 Idaho at 130.

We interpret the above listed constitutional provision and the cited case authority as mandating that the governor appoint individuals to offices created by law with the advice and consent of the state senate *unless* the method of appointment to a particular office is otherwise provided for by law. Accordingly, the Legislature has the constitutional power to designate by law who shall make appointments to an office it has created.

If the Legislature chooses to create the state office of Council Member, then it may choose, by broadening the same statute, to specify the method of appointment to it. However, if the legislation creating the offices is silent on the method of appointment, we believe that the method of appointment is already provided for in the existing statutes relating to vacancies in state offices.

Our belief concerning the applicability of existing statutes relating to vacancies in this situation is based upon a reading of the Idaho Supreme Court case of *Knight v. Trigg*, 16 Idaho 256, 100 Pac. 1060 (1909). In *Knight*, our court stated that:

It has been repeatedly held by many courts that the word "vacancy" as aptly and fitly applies to and describes the condition of a newly created office, and before it is filled by an incumbent, as it does to an office that has been occupied by a duly elected officer who subsequently died or resigned. 16 Idaho at 266.

It is our opinion that the statute creating the Council offices creates a vacancy in them upon the effective date of the legislation. Therefore the general existing statutes providing for the filling of vacancies in state offices would be applicable unless the creating statutes defined the manner of appointment. The existing statutes relating to vacancies in state office where appointments are not otherwise provided for by law are *Idaho Code* §§59-904 and 59-914. They both provide that the governor is to fill such vacancies by appointment *without* the advice and consent of the senate. Statutory provisions not requiring senate confirmation of gubernatorial appointees has been adjudged by our Supreme Court as being constitutionally proper. *In re Inman*, 8 Idaho 398, 69 Pac. 120 (1902); *Lyons v. Bottolfson*, 61 Idaho 281, P.2d 1 (1940).

Currently, only appointments made by the governor to fill vacancies in a series of certain designated offices are required to be confirmed by the senate pursuant to *Idaho Code* §59-904(b) (c) and (d). Read together with Article 4, §6 of the constitution, this vacancy filling limitation operates to allow gubernatorial appointment to newly created offices without senate confirmation unless either the act of creation or an amendment to Section 59-904 otherwise provides.

In sum, if the Legislature chooses to create Council offices by statute, it has the constitutional prerogative of detailing the method of appointment thereto, including what legal entity shall make the appointment and whether the appointment shall be subject to legislative confirmation. If the Legislature creates the Council offices and is silent on the mode of appointment, then a vacancy exists in the office which is filled by gubernatorial appointment *without* senate confirmation.

AUTHORITIES CONSIDERED:

1. Pacific Northwest Electric Power Planning and Conservation Act, Public Law 96-501.
2. 67 C.J.S. *Officers*, §5 (1978).
3. H.R. Rep. No. 96-976, Part II, 96th Cong., Sess. p.40 (Sept. 16, 1980).
4. *Sugarman v. Dougall*, 413 U.S. 634, 643 (1973).
5. *Newton v. Mahoning County*, 100 U.S. 548, 25 L.Ed. 710 (1879.)
6. 67 C.J.S. *Officers* §13 (1978).
7. *Ingard v. Barker*, 27 Idaho 124, 147 Pac. 293 (1915).
8. *Smylie v. Williams*, 81 Idaho 335, 341 P.2d 451 (1959).
9. *Idaho Constitution*, Article 4, §6.
10. *State v. Malcom*, 39 Idaho 185, 193, 226 Pac. 1083 (1924).
11. *Knight v. Trigg*, 16 Idaho 256, 100 Pac. 1060 (1909).
12. *Lyons v. Bottolfsen*, 61 Idaho 281, P.2d 1 (1940).

DATED this 19th day of January, 1981.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

DHL/RLE/tr

ANALYSIS BY:

ROY L. EIGUREN
Deputy Attorney General

cc: Idaho Supreme Court
Idaho Supreme Court Law Library
Idaho State Library

ATTORNEY GENERAL OPINION NO. 81-4

TO: Paul Peterson, Administrator
Idaho Dairy Products Commission
1365 North Orchard
Boise, Idaho 83706

Per Request for Attorney General Opinion

QUESTIONS PRESENTED:

With reference to fees for Grade A Dairy Inspections:

1. Whether the District Board of Health has the authority to establish fees or whether the State Board of Health must establish the fees.
2. If the District Health Board can set fees, must such a Board comply with the Administrative Procedures Act in promulgating the fees as rules & regulations?
3. Must the District Health Board submit a fee schedule to the State Board of Health for approval?

CONCLUSIONS:

1. *Idaho Code* §39-414(11) probably does not give a district board of health authority to establish dairy inspection fees. However, this question can only be resolved with certainty by the legislature or courts. The State Board of Health may establish such fees.
2. In any event, a district health board must comply with the Idaho Administrative Procedure Act in establishing a Grade A dairy inspection fee schedule pursuant to *Idaho Code* §39-414.
3. A district health board must submit a Grade A dairy inspection fee schedule adopted pursuant to *Idaho Code* §39-414 to the State Board of Health and Welfare for approval.

ANALYSIS:

1. *Establishment of Fee Schedules.*

It is our understanding that your questions specifically relate to the establishment of fees for Grade A dairy inspections by a district board of health. Such fees, if adopted, would be charged to dairies. It is further understood that *Idaho Code* §39-414(11) has been relied upon as the statutory authority for the power to establish such fees.

The first is the most difficult question to answer without equivocation. This is so due to ambiguities contained in *Idaho Code* §39-414(11), which grants each district board of health the power:

to establish fee schedules whereby the Board *agrees* to render services *to or for other than governmental or public agencies* for a fee reasonably calculated to cover the cost of rendering such service. [Emphasis added].

Two particularly relevant ambiguities inherent in the underscored language are:

- (A) Was the legislative intent only to preclude charging fees to other governmental units, or to authorize fees only in those situations in which the services are *not* rendered substantially to or for other governmental or public agencies?
- (B) Was the legislative intent in utilizing the language “agrees to render services” that of limiting §39-414(11) fees to those services rendered and received voluntarily?

The first ambiguity is the more difficult to resolve. Considering the precise language of §39-414(11), the courts might well construe the statute to preclude charging fees to any entity, private or governmental, where the services are substantially provided to or for another governmental entity. Analytically, the next step is to determine whether the relevant services are or will be rendered to or for the state Department of Health and Welfare (State Board) — i.e., governmental or public agencies — rather than, or as well as, to the inspected dairies.

Public health districts are governmental agencies but are not state agencies or departments. *Idaho Code* §39-401. Nevertheless, the districts perform services delegated by the Director of the Department of Health and Welfare. *Idaho Code* §39-414(2) provides in pertinent part that the district board of health has the power *and duty* to:

... do all things required for the preservation and protection of the public health, and such other things *delegated by the Director* of the State Department of Health and Welfare and this shall be authority for the Director to so delegate. [Emphasis added].

Idaho Code §37-302 requires the Director of the Department of Health and Welfare to implement dairy inspections. The Idaho State Board of Health and Welfare has promulgated rules and regulations governing all milk and milk products standards pursuant to Title 37, Chapters 1, 3, 7 and 8; and Title 39, Chapter 1, *Idaho Code*. Title 2, Chapter 18, “Rules Governing Milk and Milk Products Standards”, Rules and Regulations of the Department of Health and Welfare (11-1-80). These rules include sanitation requirements to be utilized in Grade A dairy inspection — e.g., Rule 2-18350. These rules do not include any express provision for collecting dairy inspection fees.

Prior to recent amendments, the power of delegation granted in §39-414(2) was held by the State Board rather than the Director. By resolution adopted on June 16, 1971 (as subsequently amended), the State Board of Health delegated to the district boards of health the authority and responsibility to enforce state public health laws and State Board rules and regulations relating to milk, including those for dairy inspections. No express delegation was made of any state power to charge and collect fees for dairy inspections. The Director, Department of Health and Welfare, has continued this delegation of authority and responsibility.

From this perspective, dairy inspections have been delegated by, and thus rendered to or for, the Director and the Department of Health and Welfare. This interpretation raises a serious question about the authority of district boards to establish Grade A dairy inspection fees. However, we cannot determine by applying the normal canons of construction whether this interpretation of the phrase "to or for governmental entities" will likely prevail in court. This particular wording of §39-414(11) is sufficiently ambiguous to permit the interpretation that fees may be charged to private entities which are inspected as a result of services rendered to or for governmental entities — i.e., that the legislature simply intended to preclude establishing fees chargeable to governmental entities. (Even under the latter interpretation, a question remains whether any services are rendered to or for the dairies.) It is probably unnecessary to pursue further the fruitless task of resolving this first ambiguity.

The second ambiguity relating to the language "agrees to render services" is more susceptible to clarification. The word "agrees" has been defined as follows: "to settle upon by common consent . . . to give assent . . ." *Webster's Seventh New Collegiate Dictionary* (Merriam Co. 1967). Words are normally given their common meaning. 2A Sutherland, *Statutory Construction* §47.28. First, §39-414(11) implies the requirement of common consent between the district board rendering services and the entity receiving the services for which a charge was imposed. Secondly, this point is reinforced by the wording of §39-414(4):

To enter into contracts with any other governmental or public agency whereby the district board *agrees* to render services to or for such agency in exchange for a fee reasonably calculated to cover the cost of rendering such service. This authority is to be limited to services voluntarily rendered and voluntarily received and shall not apply to services required by statute, rule, and regulations, or standards promulgated pursuant to this act or chapter 1, title 39, *Idaho Code*. [Emphasis added].

The term "agrees" is used in §39-414(4) in the context of voluntarily arranged rather than mandated services. It would appear that the same meaning for the term was intended in §39-414(11). This process of whole statute construction is described in 2A Sutherland, *Statutory Construction*, §46.05 as follows: "... each part or section [of a statute] should be construed in connection with every other part or section so as to produce a harmonious whole." See also *Jackson v. Jackson*, 87 Idaho 330, 393 P.2d 38 (1964). It is unlikely that individual dairies have voluntarily assented to inspections or that the inspections be performed by health districts. The inspection program is mandatory for Grade A dairies.

In summary, a substantial question exists with regard to the districts relying upon *Idaho Code* §39-414(11) as authority for establishing Grade A dairy inspection fees. In particular, it is likely that the section would be construed as authority for promulgating fees chargeable only for services which are voluntarily offered and accepted. If so, fees may not be charged for statutorily-required functions such as dairy inspections. However, this question can be resolved with certainty only by the legislature or judicial interpretation.

Incidentally, the State Board of Health and Welfare appears to have authority to determine whether to charge fees for dairy inspections and to set the amount of such fees. *Idaho Code* §39-119 provides:

Collection of fees for services. — The Department of Health and Welfare is hereby authorized to charge and collect reasonable fees, established by standards formulated by the Board of Health and Welfare, for any service rendered by the Department. The fee may be determined by a sliding scale according to income or available assets. The Department is hereby authorized to require information concerning the total income and assets of each person receiving services in order to determine the amount of fee to be charged.

Idaho Code §39-119 has been interpreted as authorizing the Department to charge and collect similar fees. Idaho Attorney General Opinion No. 78-42.

In the case of services delegated to the districts by the Department, if fee schedules are promulgated by the State Board, the authority to charge and collect fees for these same services may also be delegated to the districts.

2. *Compliance with Administrative Procedures Act.*

The second question, which becomes relevant only if it is assumed that a district board has the power to establish Grade A dairy inspection fees, is more easily answered. The *Idaho Code* specifically provides in §39-416:

... Every rule, regulation or standard adopted, amended, or rescinded by the district board shall be done in a manner conforming to the provisions of Chapter 52, Title 67, *Idaho Code*, and the rules and regulations promulgated thereunder by the State Board of Health and Welfare.

Chapter 52, Title 67 is the official cite to the Administrative Procedures Act (hereafter referred to as APA) and, thus, district boards are expressly made subject to the APA for rule promulgation purposes. Neither §39-416 nor the APA specifically mention establishment of fees. However, if the establishment of fee schedules is rule making for purposes of the APA and §39-416, every district board must comply with these statutory provisions.

The setting of Grade A Dairy inspection fee schedules by district boards is rule-making if a fee schedule fits the definition of a "rule" in the Idaho APA. *Idaho Code* §67-5201(7) defines "rule" as:

... each agency's *statement of general applicability* that implements, interprets or prescribes *law or policy*, or describes the organization, procedure, or practice requirements of any agency. The term ... does not include ... (a) statements concerning only the internal management of any agency and not affecting *private rights* or procedures available to the public ... [Emphasis added].

The term "statement" was utilized in this statute to provide a broad and inclusive definition of "rule". This definition was adopted to eliminate the simple expedient of avoiding the somewhat onerous rule-making process by labeling what is essentially a rule something else, such as a "bulletin" or "regulation". Thus, the definition looks behind the label at the effect of the agency action. 1 Cooper, *State Administrative Law* 108 (1965).

With regard to the phrase "general applicability", an article published at the time of the first enactment of the Idaho APA provides useful guidance:

This does not mean that, simply because a statement is of immediate concern only to a specific person, it may not also have the requisite "general applicability". The official comment to the Revised APA states that such a statement may be a "rule" if "the form is general and others who may qualify in the future will fall within its provisions." [Citations omitted]. *Idaho Administrative Agencies And The New Idaho Administrative Procedures Act*, 3 Idaho L.Rev. 61 (1966).

The Florida District Court of Appeal has interpreted a similar statute in a manner that provides some guidance: "Stripped of its irrelevant verbiage, this section of the statute defines the term 'rule' as a rule or order of general application adopted by an agency which affects the rights of the public *or interested parties*." *Polar Ice Cream & Creamery Co. v. Andrews*, 146 So. 2d 609 (Fla. Dist. Ct. App. 1962) (Emphasis added). This case indicates that an agency rule does not have to affect members of the public generally, but only a number of interested parties. This is in accord with the custom followed in Idaho, specifically by the Department of Health and Welfare. The Department of Health and Welfare makes rules for nursing homes that have no more effect on the general public than rules relating to dairy inspections.

The effect of the fee schedules in question is to impose a fee on dairies for the inspection of dairy operations required by law. It seems clear that these fee schedules are an integral part of dairy inspection programs conducted by the district health departments. In this context, the schedules are directly related to the implementation of law and policy. The fee schedules obviously do affect the private rights of individual dairies, as they impose a fee for the inspections required by law. As with other instances of licensure or inspection, the amount and payment of fees is a determinant of business operations. Fee schedules apply to dairies throughout the district, and, as they place a charge on private industry, they cannot be exempted on the grounds that they relate only to agency internal management and do not affect private rights.

The "reasonable interpretation" canon of statutory construction is relevant to the determination whether the relevant fee schedule is a rule or regulation. As its title suggests, this canon favors a reasonable result. *Jackson v. Jackson*, 87 Idaho 330, 393 P.2d 28 (1964); Sutherland, *Statutory Construction* §45.12. Considering the purposes behind the definition given "rule" in the APA, the conclusion that the terms "rule" or "regulation" include the relevant fee schedules is the more reasonable result.

In summary, the setting of Grade A dairy inspection fee schedules falls within the definition of rule-making for purposes of *Idaho Code* §39-416 and the APA. Thus, district boards must comply with §39-416 and the APA in setting such fee schedules.

3. *Approval of the State Board of Health and Welfare.*

Assuming, *arguendo*, that district health boards may establish Grade A dairy inspection fees, such fee schedules, after hearing and adoption, must be submitted to the state board for approval. *Idaho Code* §39-416 is again the key statute, and provides in relevant part:

The district board by the affirmative vote of a majority of its members may adopt . . . regulations, rules and standards . . . Before such rules

and regulations shall become effective they must be *approved by the state board of health and welfare* within one hundred twenty (120) days after the submission to the state board. [Emphasis added].

The only possible issue of interpretation is whether fee schedules established pursuant to *Idaho Code* §39-414(11) are “rules” or “regulations”. This issue was unequivocally and affirmatively answered in Section 2 of this analysis. Having so characterized fee schedules, the balance of the immediately above-quoted portion of §39-416 is clear and unambiguous. Where statutory language is clear and unambiguous, it must be held to mean what it plainly says. *Anstine v. Hawkins*, 92 Idaho 561, 447 P.2d 677 (1968); 2A Sutherland, *Statutory Construction* §46.01 (4th ed.1973).

In summary, fee schedules adopted pursuant to *Idaho Code* §39-414(11) must be submitted to the state board for approval.

AUTHORITIES CONSIDERED:

1. Title 2, Chapter 18, *Idaho Code*.
2. Title 37, Chapters 1, 3, 7 & 8, *Idaho Code*; §39-302.
3. Title 39, Chapter 1, *Idaho Code*; §§39-119; 39-401; 39-414; 39-414(4); 39-414(11); 39-416.
4. Title 67, Chapter 52, *Idaho Code*; §67-5201(7).
5. “Rules Governing Milk and Milk Products Standards”, Rules and Regulations of the Department of Health and Welfare (11-1-80); Rule 2-18350.
6. Cases:
Jackson v. Jackson, 87 Idaho 330, 393 P.2d 28 (1964).
Polar Ice Cream & Creamery Co. v. Andrews, 146 So. 2d 609 (Fla. Dist. Ct. App. 1962).
Anstine v. Haskins, 92 Idaho 561, 447 P.2d 677 (1968).
7. *Other Authorities*:
Idaho Administrative Agencies and the New Idaho Administrative Procedures Act, 3 Idaho L. Rev. 61 (1966).
2A Sutherland, *Statutory Construction* §§ 45.12; 46.01; 46.05 (4th ed. 1973).
1 Cooper, *State Administrative Law* 108 (1965).
Webster’s Seventh New Collegiate Dictionary (Merriam Co. 1967).
Attorney General Opinion No. 78-42, dated November 22, 1978.

DATED this 2nd day of February, 1981.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

DHL/LKH/nt

ANALYSIS BY:

LARRY K. HARVEY
Chief Deputy Attorney General

FRED C. GOODENOUGH
Deputy Attorney General

cc: Idaho Supreme Court
Supreme Court Law Library
Idaho State Library

ATTORNEY GENERAL OPINION NO. 81-5

TO: Sam Nettinga, Director
Idaho Department of Labor
and Industrial Services

Per Request for Attorney General Opinion.

QUESTIONS PRESENTED:

1. For a governmental unit, pursuant to *Idaho Code* §39-4116, to effectively elect to comply with the Building Code Advisory Act (and the codes, rules and regulations adopted pursuant thereto), must said governmental unit notify the Department of Labor and Industrial Services each year as to whether or not it will be electing to comply with the Act?

2. May a local governmental unit elect to comply with the Act for an unstated period of time as long as that period of time is at least a year?

CONCLUSION:

In order for a local governmental unit to effectively elect to comply with the Building Code Advisory Act and the codes, rules and regulations promulgated pursuant thereto, said governmental unit must notify the Department of Labor and Industrial Services each year of its intent to elect to comply with the Act for the one year period commencing on July 1 of the year of notification. A local governmental unit may not elect to comply with the Act for an unspecified period of time even if that period of time is at least a year.

ANALYSIS:

In 1977, the Idaho Legislature amended *Idaho Code* §39-4116, which related to the manner of enforcement of the Idaho Building Code Advisory Act, Title 39, Chapter 41, *Idaho Code*. That section as amended reads in relevant part as follows:

1. Local governments may, effective July 1 of any year, by affirmative action by resolution or ordinance taken by the governing board of a local government, prior to December 31 of the previous year, comply with the codes enumerated in this act, and such codes, rules and regulations promulgated pursuant to this act, and such inspection and enforcement may be provided by the local government, or may be provided by the department if such local government opts to comply with the provisions of this act but not to provide such inspection and enforcement, except that the department shall retain jurisdiction of inspection and enforcement of construction standards enumerated in Section 39-4109(10), *Idaho Code*, for mobile homes and recreational vehicles, and for inspection and enforcement of construction standards for manufactured buildings and commercial coaches, whether or not a local government opts to comply with the other provisions of this act. Any decision to comply with the provisions of this act must be communicated to the director in writing, and compliance must be for an entire year commencing July 1.

Although there have been no Idaho Supreme Court cases construing the above-cited section as amended, we believe that a response to your inquiry can be formulated by the consideration of generally accepted rules of statutory construction which have been applied by Idaho courts in dealing with similar problems of statutory interpretation.

In reviewing your opinion request, it appears that the central issue is whether the provision that "compliance must be for an entire year" necessarily excludes compliance for a period of time longer than a year without adopting another ordinance providing for compliance with the act and again notifying the director of the decision to comply with the act. We believe that this question can be resolved by the application of the rule of statutory construction which states, *expressio unius est exclusio alterius*: where a constitution or statute specifies certain things, the designation of such things excludes all others. This rule has generally been followed by the Supreme Court in this state. *Local 1494, International Association of Firefighters v. City of Coeur d'Alene*, 99 Idaho 630, 586 P.2d 1346 (1978); *Poston v. Hollar*, 64 Idaho 322, 132 P.2d 142 (1942); *Peck v. State*, 63 Idaho 375, 120 P.2d 820 (1941); *People v. Goldman*, 1 Idaho 714, 23 Pac. St. Rep. 714 (1878). In construing §39-4116 (the Statute under consideration herein), application of the rule leads to a conclusion that by expressly providing that compliance must be for an entire year once a local government has elected to comply with the act, the Legislature implicitly excluded the option of electing to comply for other lengths of time (i.e. periods shorter or longer than a year). Thus, it would be the opinion of this office that for *any* year in which a local government wished to elect compliance with the Act (and not just in the first year in which it elects to comply) it must satisfy all the requirements specified in §39-4116:

1. Adopt by December 31 of the previous year an ordinance or resolution providing for such compliance.

2. Its ordinance must provide for compliance for a one year period commencing July 1 of the year after the ordinance is adopted.
3. The Director of the Department of Labor and Industrial Services must be notified of the election to comply.

To not require such annual action by governmental units desiring to elect to comply with the Act would effectively nullify the express statutory requirement that the director be notified in writing of the election to comply, as the statute neither contains language requiring governmental units to furnish the Department with a copy of their enabling ordinance nor requires them to notify the Department if they subsequently elect not to comply. Such a result would violate the fundamental rule of statutory construction, that the language of a statute must be construed to give force and effect to every part thereof. *Norton v. Department of Employment*, 94 Idaho 924, 500 P.2d 825 (1972); *Stucki v. Loveland*, 94 Idaho 621, 495 P.2d 571 (1972.)

AUTHORITIES CONSIDERED:

1. *Idaho Code* §39-4116.

2. Cases:

Local 1494, International Association of Firefighters v. City of Coeur d'Alene, 99 Idaho 630, 586 P.2d 1346 (1978).

Poston v. Hollar, 64 Idaho 322, 132 P.2d 142 (1942).

Peck v. State, 63 Idaho 375, 120 P.2d 820 (1941).

People v. Goldman, 1 Idaho 714, 23 Pac. St. Rep. 714 (1878).

Norton v. Department of Employment, 94 Idaho 924, 500 P.2d 825 (1972).

Stucki v. Loveland, 94 Idaho 621, 495 P.2d 571 (1972.)

DATED this 10th day of February, 1981.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

THOMAS H. SWINEHART
Deputy Attorney General

cc: Idaho Supreme Court
Idaho Supreme Court Law Library
Idaho State Library

ATTORNEY GENERAL OPINION NO. 81-6

TO: Commissioner Don C. Loveland
Department of Revenue & Taxation
State Tax Commission
Statehouse Mail

Per Request for Attorney General Opinion

QUESTION PRESENTED:

If properties were reappraised or indexed to reach 1978 market values for the 1980 assessment rolls, will it be permissible to reappraise or index values again in 1981 in order to avoid perpetuating valuation errors which may have existed on the 1980 rolls?

CONCLUSION:

Assessors have a continuing duty to refine their estimates of 1978 market value so as to maximize equity in property taxation.

ANALYSIS:

In 1979, the Idaho legislature enacted H.B. 166 which dealt with implementation of the "1% initiative." Section 3 of that act amended §63-221, *Idaho Code*, in pertinent part as follows:

63-221. COUNTY VALUATION PROGRAM TO BE CARRIED ON BY ASSESSOR. (1) It shall be the duty of the county assessor of each county in the state to conduct and carry out a continuing program of valuation of all properties under his jurisdiction pursuant to such rules and regulations as the state tax commission may prescribe, to the end that all parcels of property under the assessor's jurisdiction are appraised at *1978 market value for assessment purposes for use during tax year 1980, and are maintained at such levels for tax years thereafter by being reappraised or indexed to reflect an inflationary rate, as provided in Section 63-923, Idaho Code.* The county assessor shall maintain in the respective offices sufficient records to show when each parcel or item of property was last appraised.

Both before and after the amendments, the assessor was required "to carry out a continuing program of valuation." Prior to the amendments, the continuing program of valuation was intended to ensure that all parcels were reappraised at least every five years.

After the amendments, the continuing program of valuation is to be conducted to the end that all parcels are

appraised at 1978 market value for assessment purposes for use during tax year 1980, *and are maintained at such levels for tax years thereafter by being reappraised or indexed to reflect an inflationary rate, as provided in Section 63-923, Idaho Code.* [Emphasis added].

The emphasized language requires assessors to reappraise or index values after 1980 in order to maintain values at the 1978 level plus the inflationary rate provided for in §63-923, *Idaho Code*. (§63-923, *Idaho Code*, provides for an inflationary adjustment not to exceed 2% per year.)

It should also be noted that the duty to refine values so as to promote equity furthers the requirements of Article 7, Section 5, Idaho Constitution, which provides in pertinent part:

All taxes shall be uniform upon the same class of subjects within the territorial limits, of the authority levying the tax, and shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation for taxation of all property, . . .

The requirements of Article 7, Section 5, Idaho Constitution were discussed in the recent case of *Merris v. Ada County*, 100 Idaho 59, 593 P.2d 394 (1979). In that case, the Idaho Supreme Court said:

In our opinion the valuation of taxable property for assessment purposes must reasonably approximate the fair market value of the property in order to effectuate the policy embodied in Idaho Constitution Article 7 §5, i.e., that each taxpayer's property bear the just proportion of the property tax burden. [Citations omitted]. *Id.*, 100 Idaho at 63.

Similarly, in *Boise Community Hotel, Inc. v. Board of Equalization*, 87 Idaho 152, 391 P.2d 840 (1964), the Court stated:

[2] This court has consistently held that the only criterion for determining value of property for ad valorem taxation is full cash or market value. *C. C. Anderson Stores Company v. State Tax Com'n*, 86 Idaho 249, 384 P.2d 677; *Appeal of Sears, Roebuck & Co.*, 74 Idaho 39, 256 P.2d 526; *Natatorium Co. v. Board of Com'rs of Ada County*, 67 Idaho 143, 147, 174 P.2d 936; *McGoldrick Lumber Co. v. Benewah County*, 54 Idaho 704, 35 P.2d 659; *In re Winton Lumber Co.*, 53 Idaho 539, 26 P.2d 124; *First Nat'l Bank v. Washington County*, 17 Idaho 306, 105 P. 1053. *Id.*, 87 Idaho at 152.

If assessors were not permitted to correct errors in values, then inequitable values would remain on the assessment rolls in future years. Consequently, the constitutional goal of uniform taxation based upon actual value would not be advanced.

In summary, by reading §63-221, *Idaho Code*, as we believe it must be read, assessors have a continuing duty to correct valuations in order to promote equity. This reading also will promote the constitutional policy of uniform assessments based upon actual value.

AUTHORITIES CONSIDERED:

1. Article 7, Section 5, *Idaho Constitution*.
2. *Section 63-221, Idaho Code*.
3. *Section 63-923, Idaho Code*.

4. Cases:

Merris v. Ada County, 100 Idaho 59; 593 P.2d 394 (1979).

Boise Community Hotel, Inc. v. Board of Equalization,

87 Idaho 152, 391 P.2d 840 (1964).

DATED this 2nd day of March, 1981.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

DAVID G. HIGH
Deputy Attorney General

cc: Idaho Supreme Court
Supreme Court Law Library
Idaho State Library

ATTORNEY GENERAL OPINION NO. 81-7

TO: John H. Clough
Lewiston City Attorney
P.O. Box 617
Lewiston, Idaho 83501

Per Request for Attorney General Opinion

QUESTION PRESENTED:

What is the scope of a city attorney's jurisdiction and duty, under *Idaho Code* §31-2604(2), when a citizen's complaint has been received in the absence of an arrest or citation?

CONCLUSION:

In order to properly exercise the prosecutorial discretion to prosecute under *Idaho Code* §31-2604(2), a city attorney has a duty to investigate the applicable and relevant evidence, which would include the review of citizen complaints received in the absence of an arrest or citation.

ANALYSIS:

The Office of County Prosecuting Attorney

Since city attorneys' criminal prosecutorial authority is a derivative of county prosecuting attorneys' statutory duties outlined in *Idaho Code* §31-

2604, it is preliminarily essential to analyze the office of county prosecuting attorney.

Although the *office* of county prosecuting attorney is embedded in the Idaho State Constitution, the *duties* of said office are statutorily, not *constitutionally* defined. Idaho Constitution, Article 5, §18; *Idaho Code* §31-2604. Article 5, §18 of the Idaho Constitution provides:

A prosecuting attorney shall be elected for each organized county in the state, . . . and shall perform such *duties as may be prescribed by law*; . . . [Emphasis added].

In order to “prescribe by law” the duties of a county prosecuting attorney, the Idaho Legislature has enacted *Idaho Code* §31-2604 which includes the following statement of criminal prosecutorial duties:

31-2604. Duties of prosecuting attorney. — It is the duty of the prosecuting attorney:

1. To prosecute or defend all actions, applications or motions, civil or criminal, in the district court of his county in which the people, or the state, or the county, are interested, or are a party; . . .
2. To prosecute all criminal actions for violation of all laws or ordinances, except city ordinances, and except traffic offenses and misdemeanor crimes committed within the municipal limits of a city when the arrest is made or a citation issued by a city law enforcement official, which shall be prosecuted by the city attorney . . .

. . . .

4. To attend, when requested by any grand jury for the purpose of examining witnesses before them; to draw bills of indictments, informations and accusations; to issue subpoenas and other process requiring the attendance of witnesses.

It must be emphasized that virtually all of the duties of the various county prosecuting attorneys are defined by statute, and the Idaho Constitution contains no reference to the duties of the county prosecuting attorney other than to indicate they “may be prescribed by law.”

The rule of law generally recognized is that where the duties of a prosecutorial authority are statutorily, not constitutionally, defined, the duties pertaining to that office may be statutorily enlarged, diminished or partially transferred to other public officers. *Hancock v. Schroering*, 481 S.W.2d 57 (Ky. 1972); *State v. Juvenile Division, Tulsa County*, 560 P.2d 974 (Okla. Crim. App. 1977); *Childs v. State*, 4 Okla. Crim. 474, 113 P. 545 (1910); *State v. Becker*, 3 S.D. 29, 51 N.W. 1018 (1892); Annot., 84 A.L.R. 3d 39, §9[a]; 63 Am. Jur. 2d, *Prosecuting Attorneys*, §22. Consequently, since the Idaho Legislature has the power to “prescribe by law” the duties of county prosecuting attorneys, it would also have the power to enlarge, diminish or transfer those duties to other public officers.

With respect to the criminal prosecutorial duties vested in county prosecuting attorneys by virtue of *Idaho Code* §31-2604 and the power of the Idaho

Legislature to enlarge or diminish those duties, the policy expressed in *Idaho Code* §31-2227 must be reconciled. The relevant provision of *Idaho Code* §31-2227 states:

31-2227. Enforcement of penal laws — Primary responsibility — Irrespective of police powers vested by statute in state, precinct, county, and municipal officers, it is hereby declared to be the policy of the state of Idaho that the primary duty of enforcing all the penal provisions of any and all statutes of this state, in any court, is vested in the sheriff and prosecuting attorney of each of the several counties.

Since the expressed policy of §31-2227 would conflict with the provision of §31-2604(2) diminishing the duties of the county prosecuting attorney and establishing narrowly defined, specific grants of prosecutorial authority in city attorneys, fundamental principles of statutory construction must be utilized to resolve this problem.

It is rather axiomatic to state that each legislative session the newly enacted laws are never written on a clean slate. Each new statute takes its place as a component part of an elaborate system of existing laws.

In conjunction with this condition, it is a well accepted legal principle that in determining legislative intent it is presumed that whenever the legislature enacts a new provision of law or amends an existing statute, it has in mind existing law relating to the same subject. *State v. Jennings*, 95 Idaho 724, 518 P.2d 1186 (1974); *State v. Long*, 91 Idaho 436, 423 P.2d 858 (1967); *Mut. Ben. Ass'n v. Robison*, 65 Idaho 793, 154 P.2d 156 (1944); 2A, Sands, *Sutherland Statutory Construction*, §51.02 (4th Ed. 1973). Therefore, it must be presumed, as a matter of law, that the Idaho Legislature considered the policy expressed through *Idaho Code* §31-2227 when it enacted the provisions of *Idaho Code* §31-2604(2) diminishing the prosecutorial duties of county prosecuting attorneys by transferring specific grants of prosecutorial duties to city attorneys.

As a corollary to the above rule, it is obvious that both §31-2227 and §31-2604(2) pertain to the same subject matter — duties of county prosecuting attorneys; hence, the doctrine of *pari-materia* becomes applicable to the statutory construction process. Basically, statutes in *pari-materia* — pertaining to the same subject matter — are, so far as reasonably possible, to be construed in harmony with each other. *Christensen v. West*, 92 Idaho 87, 437 P.2d 359 (1968); *Sampson v. Layton*, 86 Idaho 453, 387 P.2d 883 (1963); 2A, Sands, *Sutherland Statutory Construction*, §51.02 (4th Ed. 1973). However, if there is an irreconcilable conflict between the provision of a new law and prior statutes relating to the same subject matter, the new provision will control as it is the later expression of the legislature. *Owen v. Burcham*, 100 Idaho 441, 599 P.2d 1012 (1979); *Employment Sec. Agency v. Joint Class "A" School District No. 151*, 88 Idaho 384, 400 P.2d 377 (1965).

Applying these principles of statutory construction to the conflict between §31-2227 and §31-2604(2), it becomes evident that §31-2604(2) controls over §31-2227. The reason for this conclusion is that §31-2227 has remained virtually unchanged since its enactment in 1951, while §31-2604(2) has been amended several times subsequent to the enactment of §31-2227.

First, §31-2604(2) was amended in 1970 to prescribe prosecutorial duties of city attorneys for city ordinance violations only. Then, in 1971, the said statute

was again amended and diminished county prosecuting attorneys' duties over misdemeanor prosecutions and enlarged city attorney duties over misdemeanor prosecutions. The 1971 amendment occurred through Senate Bill 1143 which carried the following title:

AN ACT RELATING TO THE DUTIES OF PROSECUTING ATTORNEY, AMENDING SECTION 31-2604, *IDAHO CODE*, TO PROVIDE THAT THE PROSECUTING ATTORNEY SHALL NOT BE REQUIRED TO PROSECUTE TRAFFIC OFFENSES AND MISDEMEANOR CRIMES COMMITTED WITHIN THE MUNICIPAL LIMITS OF A CITY WHEN THE ARREST IS MADE OR A CITATION IS ISSUED BY A CITY LAW ENFORCEMENT OFFICIAL, IN WHICH CASE THE CITY ATTORNEY OR HIS DEPUTY IS RESPONSIBLE THEREFOR; . . . 1971 Idaho Session Laws, Ch. 94.

Following the above quoted title to Senate Bill 1143, the 1971 Idaho Legislature, added the following underlined wording to the already existing provisions of *Idaho Code* §31-2604(2):

31.2604. DUTIES OF PROSECUTING ATTORNEY. — It is the duty of the prosecuting attorney . . .

. . . .

2. To prosecute all criminal actions for violation of all laws or ordinances, except city ordinances, *and except traffic offenses and misdemeanor crimes committed within the municipal limits of a city when the arrest is made or a citation issued by a city law enforcement official*, which shall be prosecuted by the city attorney or his deputy, . . . 1971 Idaho Session Laws, Ch. 94.

There is an additional reason for the conclusion that the policy of §31-2227 is controlled by the provisions of §31-2604(2) relating to the diminishment of county prosecuting attorneys' duties and the enlargement of city attorney duties. That reason relates to the general and specific nature of the two statutes.

An accepted standard of statutory construction holds that where a general statute and a special or specific statute deal with the same subject, the special or specific statute will control over the general statute. *Owen v. Burcham*, *supra*; *Hook v. Horner*, 95 Idaho 657, 517 P.2d 554 (1973); *State v. Roderick*, 85 Idaho 80, 374 P.2d 1005 (1962); *State ex rel. Taylor v. Taylor*, 58 Idaho 656, 78 P.2d 125 (1938). Since *Idaho Code* §31-2227 is a very general statute dealing with state "policy" and *Idaho Code* §31-2604(2) is a very specific statute narrowly defining a grant of a prosecutorial function to city attorneys with a corresponding diminishment of the duties of county prosecutors, §31-2604(2) would control over §31-2227.

The conflict between §31-2227 and §31-2604(2) is, consequently, reconciled due to the more recent legislative amendments to §31-2604(2) and the specific nature of §31-2604(2). Hence, it may be safely concluded that although county prosecuting attorneys have been generally vested, as a matter of policy, with the primary duty of enforcing the penal provisions of any and all state statutes, the duties of county

prosecutors have subsequently been diminished through narrowly defined, specific grants of the prosecutorial function to city attorneys.

The Office of City Attorney

The Idaho Legislature, by virtue of Article 12, §1, of the Idaho Constitution has the power to designate officers of municipal governments and the *duties* to be fulfilled by each officer. *Vineyard v. City Counsel*, 15 Idaho 436, 98 P. 422 (1908). Accordingly, a city attorney is a designated officer of municipal government and the procedure for the appointment of a city attorney has been statutorily authorized and defined. *Idaho Code* §50-204. The office of city attorney, therefore, while not *directly* receiving legal efficacy from the Idaho Constitution, does have an *indirect* constitutional origin through Article 12, §1 of the Constitution which provides the following:

§1. General laws for cities and towns. — The legislature shall provide by general laws for the . . . organization . . . of the cities and towns, . . . which laws may be altered, amended, or repealed by the general laws . . .

Pursuant to Article 12, §1 of the Idaho Constitution, the Idaho Legislature is granted the power to statutorily create the office of city attorney. It is interesting to note that unlike the office of county prosecuting attorney, which is embedded directly in the Idaho Constitution, the office of city attorney is not embedded in the Constitution and could be statutorily abolished by the legislature due to the power of the legislature to alter, amend, or repeal the general laws providing for the organization of cities.

Like the office of county prosecuting attorney, the criminal prosecutorial duties of the office of city attorney have been statutorily defined by the Idaho Legislature. *Idaho Code* §31-2604(2). Pursuant to that code provision, the prosecutorial duties of a city attorney are to prosecute:

1. violations of city ordinances, and
2. traffic offenses and misdemeanor crimes committed within the municipal limits of a city when:
 - a. the arrest is made, *or*
 - b. a citation is issued by a city law enforcement official.

The Prosecutorial Function

The final issue to be addressed, since it is clear that city attorneys may be granted prosecutorial duties at the expense of diminishing the prosecutorial duties of county prosecutors, is the scope of city attorneys' prosecutorial jurisdiction and duty with respect to citizen complaints made to city attorneys in the absence of an arrest or citation. In answering this issue, the prosecutorial function of initiating a criminal case must be examined.

The federal and state case law on this subject is exhaustive. For example, it is a well accepted doctrine of federal law that the decision to bring criminal charges is a prosecutorial function. *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976); *Taylor v. Nichols*, 558 F.2d 561 (1977); *Flood v. Harrington*, 532 F.2d 1248 (1976); *Grow v. Fisher*, 523 F.2d 875 (1975); *Sykes v. Dept. of Motor Veh.*, 497 F.2d 197 (1974); *Madison v. Gerstein*, 440 F.2d 338

(1971); *Guedry v. Ford*, 431 F.2d 660 (1970); *Anderson v. Rohrer*, 3 F.Supp. 367 (1933). In total harmony with the federal forum, the states have held that the decision of whether and when to prosecute is a prosecutorial function. *State v. Williams*, 120 Ariz. 600, 587 P.2d 1177 (1978); *State ex rel. Baumert v. Municipal Court of City of Phoenix*, 120 Ariz. 341, 585 P.2d 1253 (1978); *State v. Spellman*, 104 Ariz. 438, 454 P.2d 980 (1969), supplemented 104 Ariz. 597, 457 P.2d 274 (1969); *State v. Faught*, 97 Ariz. 165, 398 P.2d 550 (1965); *People v. Fletcher*, 566 P.2d 345 (Colo. 1977); *People v. MacFarland*, 189 Colo. 363, 540 P.2d 1073 (1975); *State v. Horn*, 101 Idaho 192, 610 P.2d 551 (1980); *State v. Wilbanks*, 95 Idaho 346, 509 P.2d 331 (1973); *State v. Session*, 91 N.M. 381, 574 P.2d 600 (1978); *Jenkins v. State*, 508 P.2d 660 (Okla. Cr. (1973); *Wilson v. State*, 89 Okl. Cr. 427, 209 P.2d 512 (1949).

Undoubtedly, an integral part of both the federal and state decisions on this matter is the ethical standards relating to prosecution promulgated by both the American Bar Association and the National District Attorneys Association. Both organizations have standards clearly holding that the decision to prosecute is a prosecutorial function. ABA, *Standards Relating To The Prosecution Function and The Defense Function, Approved Draft*, 1971, Standard 3.4; ABA, *Standards For Criminal Justice*, (2nd Ed. 1980) Standard 3-3.4; NDAA, *National Prosecution Standards*, (1st Ed. 1977), Standards 9.1-9.4.

Knowing that the decision to prosecute is strictly a prosecutorial duty, the meaning of the words "prosecute" and "prosecution" becomes important to the overall analysis of this issue. While the terms "prosecute" and "prosecution" have a technical legal meaning, which is to commence and continue a suit to its ultimate conclusion, see *Black's Law Dictionary*, 1385 (4th Ed. 1957), and 34A Words and Phrases, *Prosecute, Prosecution*, 475-496, it is also proper to utilize a broader meaning which does not confine the activity to mere courtroom litigation. 2A, Sands, *Sutherland Statutory Construction*, §§47.27, 47.29 (4th Ed. 1973).

Although *Idaho Code* §31-2604(2) does not indicate at what point a city attorney's duty to prosecute attaches, it is well recognized that where a statute imposes a duty in general terms, by implication, and in the absence of limitation, all powers and duties incidental and necessary to the performance of the imposed duty are included. 2A, Sands, *Sutherland Statutory Construction*, §55.04 (4th Ed. 1973). Thus, since the decision to bring criminal charges is one of prosecution's greatest responsibilities, it would be logical to conclude that a city attorney would have inherent in this responsibility the implied duty and power to analyze and investigate citizen complaints received by his or her office in order to properly perform the duty to initiate criminal charges.

Even without the above principle of statutory construction, it has been repeatedly ruled, either through judicial fiat or ethical standards, that the prosecutorial function of deciding to criminally charge includes, as part of the proper exercise of discretion, the duty to investigate the applicable evidence and law. *Imbler v. Pachtman*, *supra*, *U.S. v. Napue*, 401 F.2d 107 (1968); *Terlikowski v. U.S.*, 379 F.2d 501 (1967); *People v. Archerd*, 3 C.3d 615, 91 Cal. Rptr. 397, 477 P.2d 421 (1970); *S.W. Bell Telephone Co. v. Miller*, 2 Kan. App. 2d 558, 583 P.2d 1042 (1978); *Sampson v. Rumsey*, 1 Kan. App. 191, 563 P.2d 506 (1977); *State v. Wallach*, 353 Mo. 312, 182 S.W.2d 313 (1944); *McKittrick v. Wymore*, 345 Mo. 169, 132 S.W.2d 979 (1939); *Candelaria v. Robinson*, 93 N.M. 786, 606 P.2d 196 (1980); *Powell v. Seay*, 560 P.2d 555 (Okla. 1976); *State v. Pettitt*, 93 Wash. 2d 288, 609 P.2d 1364 (1980); ABA, *Standards Relating To*

The Prosecution Function and The Defense Function, Approved Draft, 1971, Standards 3.1, 3.9; ABA, Standards For Criminal Justice, supra, Standards 3-3.1, 3-3.9; NDAA, National Prosecution Standards, (1st Ed. 1977), Standards 7.1, 8.2, 8.3, 9.3, 9.4; Idaho Code of Professional Responsibility, DR 7-103(A),

The United States Supreme Court, in *Imbler v. Pachtman, supra*, recognized, with the following statements, that the duty to prosecute includes a certain investigative function:¹

A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court. *Imber v. Pachtman, supra*, 47 L.Ed.2d 128, 140.

We recognize that the duties of the prosecutor in his role as advocate for the state involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom. A prosecuting attorney is required, constantly, in the course of his duty as such, to make decisions on a wide variety of sensitive issues. These include questions of . . . whether and when to prosecute, . . . Preparation, both for the initiation of the criminal process and for a trial, may require the obtaining, reviewing, and evaluating of evidence . . . *Imbler v. Pachtman, supra*, 47 L.Ed.2d 128,144, n. 33.

It is well accepted that prosecutors have a certain investigative duty in order to properly exercise their discretion to bring criminal charges. Accordingly, where the courts have analyzed a prosecutor's neglect of duty or abuse of discretion, the need for investigation has been stressed, as pointed out by the following judicial statements:

[I]f it is the statutory duty of a prosecuting attorney to commence and prosecute criminal actions, by necessary implication, he should qualify himself to determine, in the exercise of an honest discretion, if a prosecution should be commenced. The only way he can determine the question is to make an investigation of the facts and applicable law. *McKittrick v. Wymore, supra*, at 988.

We approve and adopt the [following] statement . . . as follows:

"The duty of a prosecuting officer necessarily requires that he investigate, i.e., inquire into the matter with care and accuracy, that in each case he examine the available evidence, the law and the facts, and the applicability of each to the other; . . ." *State v. Wallach, supra*, at 318-319.

The rationale for including an investigation of relevant evidence as part of the prosecutor's duties is further recognized through a Washington court in the case of *State v. Pettitt*.

¹This opinion analyzes the "prosecutorial function" without reference to that function's relationship to various forms of prosecutorial immunity. Generally, for purposes of immunity in a suit against a prosecutor under a state tort law or the Civil Rights Act, 42 U.S.C. §1983, investigation is not considered a function "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman*, 424 U.S. 409, 430.

It is firmly established that a prosecutor has wide discretion to charge or not to charge a suspect . . . The discretion lodged in the office necessarily assumes that the prosecutor will exercise it after an analysis of all available relevant information. *State v. Pettitt, supra*, at 1367.

Additionally, a prosecutor's investigation has been classified as an "intrinsic part of [the] prosecutorial function." *Powell v. Seay, supra*, at 555.

The following series of quoted standards and commentary from the American Bar Association unmistakably define the prosecutorial function to include investigation.

(a) [T]he prosecutor has an affirmative responsibility to investigate suspected illegal activity when it is not adequately dealt with by other agencies. ABA, *Standards For Criminal Justice* (2nd Ed. 1980), Standard 3-3.1

(a) The decision to institute criminal proceedings should be initially and primarily the responsibility of the prosecutor.

...

(c) The prosecutor should establish standards and procedures for evaluating complaints to determine whether criminal proceedings should be instituted. *Id.*, Standard 3-3.4

(a) It is unprofessional conduct for a prosecutor to institute, or cause to be instituted, or to permit the continued pendency of criminal charges when it is known that the charges are not supported by probable cause. *Id.*, Standard 3-3.9

The charging decision is the heart of the prosecution function. The broad discretion given to a prosecutor in deciding whether to bring charges and in choosing the particular charges to be made requires that the greatest effort be made to see that this power is used fairly and uniformly . . .

A prosecutor ordinarily should prosecute if, *after full investigation*, it is found that a crime has been committed, the perpetrator can be identified, and there is sufficient admissible evidence to support a verdict of guilty. [Emphasis added] *Id.*, Commentary to Standard 3-3.9

Idaho's *Code of Professional Responsibility*, through DR 7-103(A) provides that "[a] public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are unsupported by probable cause." It is difficult to conceive of how a prosecutor, or a city attorney, could comply with this ethical standard unless investigation of the applicable information, including citizen complaints received in the absence of an arrest or citation, has been completed by the charging attorney.

As a conclusionary comment, it must be stressed that *Idaho Code* §31-2604(2) does not prohibit a city attorney from investigating, initiating and prosecuting a criminal case concerning a matter arising within the city, as long as the matter fits within the city attorney's grant of prosecutorial duties

and the resulting arrest is made or the citation is issued by a city law enforcement official. Also, §31-2604(2) does not preclude a county prosecuting attorney from investigating and initiating criminal cases that may ultimately become the duty of the city attorney if the arrest is made or the citation is issued by a city law enforcement official. Hence, it is of paramount importance that county prosecuting attorneys and city attorneys cooperate to establish workable procedures so that their joint responsibilities under *Idaho Code* §31-2604(2) blend together consistently and without injury to the public trust.

AUTHORITIES CONSIDERED:

1. *Imbler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984, 47 L.Ed.2d 128 (1976).
2. *Taylor v. Nichols*, 558 F.2d 561 (1977).
3. *Flood v. Harrington*, 523 F.2d 1248 (1976).
4. *Grow v. Fisher*, 523 F.2d 875 (1975).
5. *Sykes v. Dept. of Motor Veh.*, 497 F.2d 197 (1974).
6. *Madison v. Gerstein*, 440 F.2d 338 (1971).
7. *Guedry v. Ford*, 431 F.2d 660 (1970).
8. *U.S. v. Napue*, 401 F.2d 107 (1968).
9. *Terlikowski v. U.S.*, 379 F.2d 501 (1967).
10. *Anderson v. Rohrer*, 3 F. Supp. 367 (1933).
11. *State v. Williams*, 120 Ariz. 600, 587 P.2d 1177 (1978).
12. *State ex rel. Baumert v. Municipal Court of City of Phoenix*, 120 Ariz. 341, 585 P.2d 1253 (1978).
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14. *State v. Faught*, 97 Ariz. 165, 398 P.2d 550 (1965).
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16. *People v. Fletcher*, 566 P.2d 345 (Colo. 1977).
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18. *State v. Horn*, 101 Idaho 192, 610 P.2d 551 (1980).
19. *Owen v. Burcham*, 100 Idaho 441, 599 P.2d 1012 (1979).
20. *State v. Jennings*, 95 Idaho 724, 518 P.2d 1186 (1974).
21. *Hook v. Horner*, 95 Idaho 657, 517 P.2d 554 (1973).

22. *State v. Wilbanks*, 95 Idaho 346, 509 P.2d 331 (1973).
23. *Christensen v. West*, 92 Idaho 87, 437 P.2d 359 (1968).
24. *State v. Long*, 91 Idaho 436, 423 P.2d 858 (1967).
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29. *State ex rel. Taylor v. Taylor*, 58 Idaho 656, 78 P.2d 125 (1938).
30. *Vineyard v. City Counsel*, 15 Idaho 436, 98 P. 422 (1908).
31. *S.W. Bell Telephone Co. v. Miller*, 2 Kan. App. 2d 558, 583 P.2d 1042 (1978).
32. *Sampson v. Rumsey*, 1 Kan. App. 191, 563 P.2d 506 (1977).
33. *Hancock v. Schroering*, 481 S.W.2d 57 (Ky. 1972).
34. *State v. Wallach*, 353 Mo. 312, 182 S.W.2d 313 (1944).
35. *McKittrick v. Wymore*, 345 Mo. 169, 132 S.W.2d 979 (1939).
36. *Candelaria v. Robinson*, 93 N.M. 786, 606 P.2d 196 (1980).
37. *State v. Session*, 91 N.M. 381, 574 P.2d 600 (1978).
38. *State v. Juvenile Division, Tulsa County*, 560 P.2d 974 (Okla. Crim. App. 1977).
39. *Powell v. Seay*, 560 P.2d 555 (Okla. 1976).
40. *Jenkins v. State*, 508 P.2d 660 (Okla. Cr. 1973).
41. *Wilson v. State*, 89 Okl. Cr. 427, 209 P.2d 512 (1949).
42. *Childs v. State*, 4 Okla. Crim. 474, 113 P. 545 (1910).
43. *State v. Becker*, 3 S.D. 29, 51 N.W. 1018 (1892).
44. *State v. Pettitt*, 93 Wash. 2d 288, 609 P.2d 1364 (1980).
45. 42 U.S.C. §1983.
46. *Idaho Constitution*, Article 5, §18.
47. *Idaho Constitution*, Article 12, §1.

48. *Idaho Code* §31-2227.
49. *Idaho Code* §31-2604.
50. *Idaho Code* §50-204.
51. 1971 Idaho Session Laws, Ch. 94.
52. 63 Am. Jur. 2d, *Prosecuting Attorneys*, §22.
53. Annot. 84 A.L.R. 3d 29 §9[a].
54. *Black's Law Dictionary*, 1385 (4th Ed. 1957).
55. 2A, Sands, *Sutherland Statutory Construction*, §§47.27, 47.29 (4th Ed. 1973).
56. 2A, Sands, *Sutherland Statutory Construction*, §51.02 (4th Ed. 1973).
57. 2A, Sands, *Sutherland Statutory Construction*, §55.04 (4th Ed. 1973).
58. 34A Words and Phrases, *Prosecute, Prosecution*, 475-496.
59. ABA, *Standards For Criminal Justice* (2nd Ed. 1980), Standards 3-3.1, 3-3.4, 3-3.9.
60. ABA, *Standards Relating To The Prosecution Function and The Defense Function, Approved Draft*, 1971, Standards 3.1, 3.4, 3.9.
61. *Idaho Code of Professional Responsibility*, DR 7-103(A).
62. NDAA, *National Prosecution Standards*, (1st Ed. 1977), Standards 7.1, 8.2, 8.3, 9.1-9.4.

DATED this 16th day of April, 1981.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

MBK/jci

ANALYSIS BY:

MICHAEL B. KENNEDY
Chief, Criminal Justice Division

ATTORNEY GENERAL OPINION NO. 81-8

TO: Director Gordon C. Trombley
Department of Lands
Statehouse Mail

Per Request for Attorney General Opinion

QUESTION PRESENTED:

When a grazing lease application conflicts with only a portion of lands under an existing grazing lease, is the State Board of Land Commissioners required to follow the statutory conflict bid procedure for the specific portion of lands conflicted, or does the Board have the power to determine the size of a manageable unit for any grazing lease including conflict applications?

CONCLUSION:

The State Board of Land Commissioners is empowered by constitutional and statutory authority and discretion to determine the size of a manageable unit and set the terms for a grazing lease including conflict applications.

ANALYSIS:

Under Idaho statutes a grazing conflict may occur when an existing grazing lease is about to expire. During this period another individual may submit a timely application for a grazing lease on the same land. This is referred to as a simultaneous filing. The result is a "conflict" which under Idaho law is resolved by an auction. *Idaho Code*, §§58-307, 58-310.

It is our understanding that a problem occurs when the new applicant, known as the "conflict applicant", applies for only a portion of the existing but expiring lease unit. The question then arises whether the State Board of Land Commissioners must hold an auction limited to the portion of the expiring lease applied for by the conflict applicant, or whether the Board has authority to determine the size and boundaries of the conflict lease. The answer to this question rests in an analysis of the Board's fundamental constitutional powers and statutory directives, including Article 9, Section 8, *Idaho Constitution*, the general leasing laws, *Idaho Code*, §58-304, and the specific conflict lease statutes, *Idaho Code*, §§58-304 and 58-307. These laws must be read together and, unless plainly irreconcilable, construed in harmony. *Christensen v. West*, 92 Idaho 87, 437 P.2d 359 (1968) 2A *Sutherland Statutory Construction*, §51.02, 291-92.

Article 9, Section 8, of the *Idaho Constitution* provides in part:

It shall be the duty of the State Board of Land Commissioners to provide for the location, protection, sale or rental of all the lands heretofore, or which may hereafter be granted to the State by the general government, under such regulations as may be prescribed by law, and in such manner as will secure the maximum possible amount therefor.

This section constitutes the foundational, pervasive authority of the State Board of Land Commissioners over the disposition of State lands including the "location" and the "rental" thereof. This section further requires that the Board exercise its powers in conformity with state law. *Idaho Code* §58-304, states that the Board "... may lease any portion of the land of the state ...". The Idaho Supreme Court, in construing identical language authorizing the Board to issue mineral leases, *Idaho Code* §47-704, emphasized the permissive "may", and held that the Board cannot be compelled to issue a lease in the absence of arbitrary, capricious, or illegal abuse of discretion. *Allen v. Smylie*, 92 Id. 846, 452 P.2d 343 (1969). Moreover, the Board is authorized to lease "any portion" of the land of the State. I.C., 58-304. Thus, in the first instance, the Board has the power to determine the size and parameters of a manageable unit for a grazing lease.

The power to establish the size and boundaries of a manageable unit for a grazing lease is a critical element for the Board in achieving optimal management of the land and maximum return therefrom. The plan of the Department of Lands, under the direction of the Board, is to examine a unit of land and consider the terrain, water availability, forage capacity, access, and other factors in the context of a potential grazing lease. From this analysis, the Department recommends to the Board a management unit for a grazing lease. The lease will include "management prescriptions" or specific instructions for grazing, management, and associated use of the designated tracts of land. The objectives are to assure sound management, to protect the resource, and to maximize income from the leasing of the land, as required by Article 9, Section 8, *Idaho Constitution*.

The Board's power to determine the size of a manageable unit for a grazing lease is not diminished or limited by Idaho statutes concerning conflict leases. *Idaho Code*, §58-307 establishes the application filing dates and declares: "Where conflicts appear, such applications filed between said dates shall be considered as having been filed simultaneously." The procedure for resolving simultaneously filed applications is set forth in *Idaho Code*, §58-310. That section states:

When two or more persons apply to lease the same land, then in such cases, the Director of the Department of Lands . . . shall auction off and lease said land to the applicant who will pay the highest premium bid therefor, the annual rental to be established by the . . . Board . . .

The phrase "to lease the same land" means the land established by the Board as a manageable unit. In some cases, this unit will consist of the entire leasehold under the existing grazing lease. In other cases, the new unit may consist of lesser acreages based upon additional studies of forage capacity, terrain, water, access and other factors.

The Board's power to designate the size of a manageable unit for a grazing lease is reiterated in Section 58-310:

If any applicants fail to appear in person or by proxy at the time and place so designated in said notice, the Director may proceed to auction and lease any part or all of the lands applied for: provided that said Board of Land Commissioners shall have power to reject any and all bids made at such auction sales . . .

The Director is thus expressly empowered to set the size of the manageable unit of the grazing lease.

The conclusion presented herein is supported by the Idaho Supreme Court in refusing to grant a writ of mandamus requiring the State Board of Land Commissioners to issue a mineral lease. The Court declared:

It is with the judgment of the Board whether the leasing to a particular lessee of particular land at a particular time for whatever rental would "secure the maximum possible amount therefor." We therefore hold that to grant or to reject a lease is a discretionary power of the Board and thus the writ of mandate would not be available to compel them to do so in the absence of conduct that is arbitrary, capricious or discriminatory. *Allen v. Smylie*, 92 Id. at 850.

The Court emphasized that it was within the discretion of the Board to determine which terms would secure the maximum return for the lease of the lands. The Court stated:

We find nothing in the statutes that prohibits the Board from executing such lease terms. It is within the Land Board's constitutional power and discretion to lease for maximum return. It is for the Board to decide if such terms were a necessary part of obtaining phosphate leases for maximum return. In the absence of statutory prohibition, the Board's determination of lease terms will not be disturbed by the Court unless clearly discriminatory, capricious or unreasonable. 92 Id. at 852.

The Board is thus empowered to determine the size of a manageable unit upon the initial issuance of a grazing lease and at the time of any conflict lease applications. The Board is authorized to determine the size and terms of a grazing leasehold which in its discretion will maximize return therefrom. Moreover, the Board by Constitution and statute is subject to a mandatory duty to exercise sound management of the land in a manner which will not sacrifice long-term maximization of income for apparent short-term benefits. The right of the Board to delineate grazing units is not only authorized but is required as an integral part of sound management by constitutional and statutory mandates. This is the only construction which is consistent with the Board's broad constitutional powers and discretion over the disposition and leasing of State lands and with the language quoted above from *Idaho Code* §58-304. The Attorney General's office reached the same conclusion in responding to a similar question in a letter guideline dated January 24, 1977:

In response to your second question, the Idaho Constitution and the statutes have designated the Board of Land Commissioners as the manager of State land. Without legislation in the area, the Board must exercise its discretion through the Director of the Department of Lands in leasing State lands. Section 58-105, *Idaho Code*. It is *within the limits of that discretion to decide that "manageable" or "economical" units are required to maximize the income to the State on a given piece of property. The alternative would allow the prospective lessee to dictate to the State what areas he would lease.* Letter from Robert MacConnell, Deputy Attorney General, Chief, Natural Resources Division, to Gordon Trombley, (January 24, 1977).

It is therefore incorrect to construe the phrase "to lease the same land" in §58-310, as including the situation in which a conflict lease applicant applies for only a portion of the lands contained in an existing lease. Such a construction would in many instances result in arbitrary grazing units and ineffective management of grazing lands. Without the power to set the size of conflict lease units, the Board would be divested of its powers to implement and fulfill its responsibilities required by law to assure sound management and maximization of income. Such an interpretation and resulting consequences are plainly undesirable and contrary to the express language of the statutes and Constitution.

In the event that a new lease application conflicts only a portion of the lands under an existing but expiring grazing lease, the Board and the Director of the Department of Lands are fully authorized to advise the conflicting lease applicant of the management unit established by the Board and, if the conflict is to remain valid, advise the applicant to submit an amended application for the designated management unit within a reasonable period of time such as thirty days. If the application is thereafter timely amended, the conflict priority date should relate back to the original filing.

AUTHORITIES CONSIDERED:

1. *Idaho Constitution*, Article 9, §8.
2. *Idaho Code* §§58-304, 58-307, 58-310, 47-704.
3. *Christensen v. West* 92 Idaho 87, 437 P.2d 359 (1968).
4. *2A Sutherland Statutory Construction* §57.02, 291-92.
5. *Allen v. Smylie*, 92 Idaho 846, 452 P.2d 343 (1969).

DATED this 21st day of April, 1981.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

L. MARK RIDDOCH
Deputy Attorney General

cc: Idaho Supreme Court
Supreme Court Law Library
Idaho State Library

ATTORNEY GENERAL OPINION NO. 81-9

TO: C. W. Cowl
Director
State of Idaho
Department of Corrections

Per Request for Attorney General Opinion

QUESTION PRESENTED:

May deadly force be used to suppress a riot at the Idaho State Correctional Institution?

CONCLUSION:

Deadly force may be used to suppress a riot to the extent that such force is reasonable and necessary under the circumstances and non-deadly alternatives have either failed or are not reasonably available.

ANALYSIS:

Public officials in charge of correctional facilities and prisons serve as the legal custodians of large numbers of inmates, including many who are confined for crimes of violence and many who are violent in nature. Consequently, correctional staffs are often confronted with situations that require the use of force in order to maintain or regain discipline and control over inmates. When a riot breaks out in a prison, the ability of public officials to suppress such an occurrence becomes a public duty, but this duty must be discharged in a lawful manner with a minimum amount of personal injury or loss of human life.

Definition Of Riot:

A riot is defined by Idaho law as any use of force or violence disturbing the public peace, or any threat to use such force or violence, if accompanied by immediate power of execution, by two (2) or more persons acting together, and without authority of law. *Idaho Code* §18-6401. Every person who participates in a riot is guilty of a misdemeanor. *Idaho Code* §18-6402.

Duty Of Public Officers With Respect To A Riot:

Since participation in a riot is a crime under Idaho law, the many law enforcement duties normally associated with the enforcement of penal law become effective. However, in addition to those duties, the law places special additional duties upon various public officials with respect to riotous behavior.

This point is clearly explained by the Appellate Court of Illinois as follows:

The peace of the people is a fundamental function of our democracy . . . In these days of stress and social unrest the law must effectively act to prevent rioting or mob activity. *City of Chicago v. Lambert*, 47 Ill. App. 2d 151, 197 N.E.2d 448, 454 (1964).

Generally, courts will not sanction riotous conduct in any form, and when the clear and present danger of a riot occurs the state has the power to prevent such activity. *People v. Davis*, 67 Cal. Rptr. 547, 439 P.2d 651 (1968).

In Idaho, an extraordinary duty accruing to certain public officials is statutorily attached to riotous circumstances. For example, it is the duty of all county sheriffs to preserve the peace and prevent and suppress all riots and insurrections which may come to their knowledge. *Idaho Code* §31-2202. Moreover, where any number of persons, whether armed or not, are unlawfully or riotously assembled, the sheriff of the county and his deputies must go among the persons assembled, or as near to them as possible, and command them in the name of the people of the state to immediately disperse. *Idaho Code* §19-224. Accordingly, if persons riotously assembled do not immediately disperse when commanded to do so by the sheriff of the county, through the authority of *Idaho Code* §19-224, the individuals are subject to arrest. *Idaho Code* §19-225. In discharging the duty to suppress a riot, the sheriff has the power to require assistance from municipal and state peace officers. *Idaho Code* §31-2227.

Idaho Code §20-209B makes it amply clear, however, that the suppression of a riot at the state penitentiary is the *primary* responsibility of the state director of corrections, who may request assistance from the county sheriff.

20-209B. Duty to control disturbances at state penitentiary. — It shall be the primary duty of the state director of correction, or his designee, to prevent, control and suppress all riots, escapes, affrays and insurrections at the state penitentiary or other place maintained by the state board of correction which come to his knowledge, and to control and suppress all attempts to riot or escape.

The director of correction, or his designee, shall be primarily responsible for all security measures to be taken at the time of any riot, escape, affray or insurrection, or attempts to commit the same, at the state penitentiary or other place under the control of the state board of correction.

Any county sheriff, deputy sheriff or any person so acting, and all other law enforcement officers, shall be subject to the authority herein conferred upon the director of correction, or his designee, and shall be subject to his direction and control during any riots, escapes, affrays, insurrections, or attempts to commit the same, at the state penitentiary or other place maintained by the state board of correction.

Nothing in this act shall preclude the use of any county sheriff or other law enforcement officers by the director of correction during any such existing emergency. If at any such time the director of correction shall find need for the assistance of any county sheriff or other law enforcement officers, the sheriff and such other officers may respond and render assistance at the direction of the director of correction. *Idaho Code* §20-209B.

This duty to suppress a riot is given added weight through the reason expressed in the following statutory language:

If a magistrate or officer, having notice of an unlawful or riotous assembly, . . . neglects to proceed to the place of assembly, or as near

thereto as he can with safety, and to exercise the authority with which he is invested for suppressing the same and arresting the offenders, he is guilty of a misdemeanor. *Idaho Code* §18-6407.

As recognized by the federal court in the litigation resulting from the riot at the village of Wounded Knee, South Dakota,

A riot is a situation that presents a clear danger to the populace and the police themselves and requires the unusual exercise of police power which courts should not easily or lightly interfere with. *United States v. Williams*, 372 F. Supp. 65, 66 (1974).

This fundamental principle has likewise been accepted in Connecticut. See *State v. Boles*, 5 Conn. Cir. 22, 240 A.2d 920 (1967). In further recognition of this duty it has been judicially acknowledged and accepted that prison officials have the "serious responsibility" of maintaining order and protecting lives.

While prison officials must be concerned with the constitutional rights of inmates, they are likewise charged with the very serious responsibility of maintaining order and protecting the lives of employees of the institution. *Collins v. Schoonfield*, 363 F. Supp. 1152, 1164 (1973).

The Use Of Force To Suppress A Riot:

With the duty of certain public officials to suppress riot so clearly promulgated, the issue that logically must be addressed is the manner of *lawfully* suppressing riots. Prison officials should be afforded broad discretion in maintaining order and discipline, but are not justified in using any amount of force to do so; only reasonable force under the circumstances may be lawfully employed. *Ridley v. Leavitt*, 631 F.2d 358 (1980).

Initially, in the analysis of the right to use force to quell a prison riot, it must be pointed out that, even in the absence of a riot, force may be used against inmates under certain circumstances.

It has generally been recognized that prison officials have a privilege to use force against inmates in five fact situations. These areas are: (1) self defense; (2) defense of third person; (3) enforcement of prison rules and regulations; (4) prevention of escape; and (5) prevention of crime. Palmer, *Constitutional Rights of Prisoners*, 2nd Ed., p.15.

Moreover, it has long been recognized that prison authorities may use reasonable force in the administration of a prison. *Argentine v. McGinnis*, 311 F. Supp. 134 (1969).

Applying the general principles of law dealing with the government's use of force, it is not surprising to find that the use of physical force to quell a riot, when necessary, has been generally judicially recognized. *Collins v. Schoonfield*, *supra*; *Harrah v. Leverette*, 271 S.E.2d 322 (W. Va. 1980). And, consistent with other principles of law dealing with the government's use of force as discussed *post*, in quelling a disturbance or riot, the force that is utilized must be necessary and reasonable under the circumstances. *Heard v. Rizzo*, 281 F. Supp. 720 (1968); *Kent v. Southern Ry. Co. et al.*, 184 S.E. 638 (Ga. 1936). Necessary force has been interpreted by a majority of courts to mean force "appar-

ently” necessary rather than “actually” necessary. This would mean that the officer may use such force as he reasonably believes to be necessary under the circumstances; that is, the degree of force which an ordinarily prudent and intelligent person, with the knowledge of one in the situation of the officer, would have deemed necessary. Annot. 83 A.L.R. 3d 174, §§2[a], 7[a]; 6A CJS *Arrest*, §49, p.113-14; 5 Am. Jur. 2d *Arrest*, §81.

With respect to the reasonableness of the force, the following factors should be considered in determining whether the degree of intentional force used in quelling a riot was reasonable:

1. the need for the application of force,
2. the relationship between the need and the amount of force that was used,
3. the extent of injury inflicted, and
4. whether the force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

LeBlanc v. Foti, 487 F. Supp. 272 (1980); *McCargo v. Mister*, 462 F. Supp. 813 (1978); *Johnson v. Glick*, 481 F.2d 1028 (1973).

Aptly expressing the reason for the use of force, the United States District Court of the Eastern District of Louisiana said: “The management by a few guards of large numbers of prisoners, not usually the most gentle or tractable of men and women, may require and justify the occasional use of a degree of intentional force.” *LeBlanc v. Foti*, *supra*, 275.

In discussing the bloody Attica prison riot of 1971, the South Carolina Department of Corrections, in its published book entitled *the emerging Rights of the Confined*, [sic] provided the following relevant discussion on the use of force to quell a prison riot:

If the threat were as serious as a riot, the use of gas and mace would be reasonable as would clubs and dogs if the situation required their use. No court has asked any prison administrator to “turn the other cheek” while trying to control delinquent inmates, but the requirement of reasonable force is directed at the “use of a cannon to stop a fly”. Even where the force may have initially been reasonable, its continued application will exceed constitutionally permissible bounds. The use of strong physical force to quell a full blown riot has been deemed necessary by some prison administrators and no federal court has thus far “second guessed” them. However, if the use of physical force continues after the need for it has passed, the federal court would consider this as an unconstitutional use of force. In *Inmates of Attica v. Rockefeller*, the Second Circuit took an unprecedented step in placing a team of federal observers in Attica prison to insure the safety of the inmates from further physical abuse by supervisory personnel. These acts of abuse occurred in the aftermath of the devastating riot which took place in that institution in September, 1971. *the emerging Rights of the Confined*, [sic] S.C. Dept of Corrections (1972), p.135.

The Use Of Non-Deadly Force:

There is little room for doubt that virtually all federal and state jurisdictions faced with an issue relating to the government's use of force to suppress a prison riot would require that non-deadly alternatives be first attempted, if they are reasonably available, before the application of deadly force.

Our society places great emphasis on the value of human life and on the right of every person to be free from offensive physical contact by another. Consequently, the use of force by one individual against another is frowned upon. For this reason, force is permissible only when all *non-forceful alternatives have failed*. [Emphasis added]. Palmer, *Constitutional Rights of Prisoners*, 2nd Ed., p.16.

As an example of this legal attitude, priorities for the use of force in quelling prison riots promulgated in other jurisdictions are as follows:

1. physical restraint
2. show of force
3. use of physical force other than weapons fire (riot squads)
4. use of high pressure water
5. use of chemical agents
6. fire by selected marksmen
7. use of full weapons fire power

McCargo v. Mister, supra.

Also, the use of mace or tear gas has been sanctioned for the purpose of quelling prison riots, when necessary and reasonable under the circumstances. *LeBlanc v. Foti, supra*; *Spain v. Procutner*, 600 F.2d 189 (1979). However, dangerous chemical agents such as tear gas should be limited to circumstances presenting the utmost degree of danger and loss of control, after other reasonable nonforceful solutions have failed. *McCargo v. Mister, supra.*

The Use Of Deadly Force:

Federal case law has unambiguously defined the circumstances under which deadly force may be used in a prison. The use of a potentially deadly force or substance against inmates in a correctional facility is justified only under narrowly defined circumstances, to wit: there is (1) an actual or imminent threat of death or bodily harm or escape, (2) an actual or imminent threat of serious damage to a substantial amount of valuable property, or (3) an actual or incipient riot involving a large number of unconfined inmates. *Spain v. Procutner*, 600 F.2d 189 (1979); *Spain v. Procutner*, 408 F. Supp. 534 (1976).

The use of deadly force to suppress a riot has been recognized to have common law origin. Under common law, peace officers have the privilege of using deadly force for the purpose of suppressing or quelling a riot if the riot is one

which threatens death or serious bodily harm. *Burton v. Waller*, 502 F.2d 1261 (1974); *Smith v. United States*, 330 F. Supp. 867 (1971); *Restatement of the Law*, 2nd Ed., Torts 2d, §142(2).

In order for a peace officer to have the right to use deadly force to suppress or quell a riot, it is not necessary that the avowed purpose of the participants in the riot be to accomplish death or serious bodily harm, but that the conduct of the participants is such as to create the probability or even possibility of such consequences. *Burton v. Waller*, *supra*; *Restatement of the Law*, *supra*, Comment on Subsection (2). The riot at the Idaho State Correctional Institution last summer, the 1980 riot at the New Mexico prison, and the 1971 riot at the Attica Correctional Facility in New York¹ all provide ample evidence that prison riots inevitably include felony crimes such as murder, manslaughter, mayhem, arson, malicious injury to property, aggravated assault, aggravated battery, and false imprisonment. This reality has long been officially recognized by many commentators, including the following:

[A] riot, the purpose of which is the wholesale destruction of structures or chattels, usually involves something more than a bare possibility of serious bodily harm to persons in the vicinity. *Restatement of the Law*, *supra*, Comment on Subsection (2) of §142.

The privilege to use deadly force in the suppression of a riot, therefore, is not unrestrained, but is subject to the limitation that the deadly force must be reasonable and necessary under the circumstances and a lesser force will not prevent the apprehended harm. *Burton v. Waller*, *supra*. This legal doctrine was forcefully demonstrated by the Fifth Circuit Court of Appeals in the *Waller* case with the following statements:

The barrage of gunfire far exceeded the response that was appropriate for a detachment the size of this one and under the circumstances which it faced. This conclusion is not judicial second guessing of officers faced with danger, rendered from the quiet and safety of judges' chambers. It is what the evidence shows. The testimony touching the issue of appropriate response from a large detachment coming under sniper fire uniformly rejected as unacceptable the barrage that took place at Jackson State. Under the evidence, the fire was excessive in volume and in intensity, and the size of the area subjected to fire was beyond the physical limits of justifiable response. *Burton v. Waller*, *supra*, 1272.

Use Of Force In Non-Riot Situations:

Many of the legal principles relating to the government's lawful use of force to quell a riot are analogous to the government's lawful use of force in non-riot situations. As an illustration of this pattern, in making an arrest an

¹It must be noted that the Attica Riot of 1971 and the bloody recovery by New York State of control of the Attica Prison cost 43 lives. Negotiations to peacefully terminate the four day riot were unsuccessful. Four individuals were killed during the riot itself — three inmates and one correctional guard. In order for the State of New York to regain control of the prison 39 lives were lost — 29 inmates and 10 guards and civilian hostages working at Attica. An additional 83 individuals received surgical treatment for non-fatal injuries. Although these facts were discussed in *Inmates of Attica v. Rockefeller*, 453 F.2d 12 (1971), the federal court's only concern was with the unnecessary and unreasonable use of force after control of the prison was regained.

officer is allowed to use all necessary means to effect the arrest. *Idaho Code* §19-610. Most courts have held that in arresting a felon an officer may use deadly force only when necessary, and that such force should only be used as a last resort when there is no other reasonably apparent method of effecting the arrest or preventing escape. Annot. 83 A.L.R. 3d 174 §§ 2[a], 7[a]. *Wharton's Criminal Procedure*, 12th Ed. §81, p.200, n. 72; 6A CJS *Arrest*, §49, p.113-15; 5 Am. Jr. 2d *Arrest*, §84.

However, since 1925 it has been the law in Idaho that an officer may not use deadly force in arresting or stopping the flight of a misdemeanor. *State v. Wilson*, 41 Idaho 616, 243 P. 359 (1925). Also, it is a universal law in this country that the use of deadly force upon a misdemeanor is prohibited. Annot. 83 A.L.R. 3d 238; *Wharton's Criminal Procedure*, 12th Ed., §81; 5 Am. Jur. 2d *Arrest*, §§82-83. In addition, practically every state has, by statute, made escape or attempted escape by a convicted felon a felony. Hence, the rules regarding use of force to prevent a felony apply to preventing an escape; that is, force, including deadly force as a last resort, may be employed. *Idaho Code* §18-2505; Palmer, *Constitutional Rights of Prisoners*, *supra*, p.19. Accordingly, the right to use deadly force in a felony situation is not absolute and such force cannot be used simply because a felon, as opposed to a misdemeanor, is involved. Annot. 83 A.L.R. 3d 174 §§ 2[a], 7[a].

At this point, a distinction must be drawn between the prohibition against a peace officer's use of deadly force to effectuate an arrest of or prevent the escape of a misdemeanor and the government's duty and right to suppress a riot with the use of deadly force as explained herein. Even though participation in a riot is a mere misdemeanor, see I.C. §18-6402, the public officers suppressing a riot are accomplishing more than simply the arrest of rioters. The action of quelling a riot is unmistakably distinguishable from the action of arresting an individual for participating in a riot. Consequently, although a peace officer is generally not justified in killing in order to effectuate the arrest of a misdemeanor or to prevent his escape after arrest, this rule has recognized exceptions such as riots and mob violence. *State v. Smith*, 103 N.W. 944 (Iowa 1905).

Justifiable Homicide:

As a corollary to the right to use necessary deadly force to suppress a riot, it has long been established that homicide is justifiable when *necessarily* committed by any person in lawfully suppressing any riot, or in lawfully keeping and preserving the peace. *Idaho Code* §18-4009 (4); Torcia, *Wharton's Criminal Law 14th Ed.*, §121. Furthermore, it is generally accepted that it is justifiable homicide to kill in order to suppress a riot when there is *no other reasonable alternative*. Anderson, *Wharton's Criminal Law and Procedure*, §205. Additionally, homicide is justifiable when *necessarily* committed by public officers in the discharge of their legal duty. *Idaho Code* §18-4011.

Conclusion:

In closing, taking into consideration the duty of certain public officials to suppress riots and the judicial and statutory approval of the use of *necessary* deadly force in such situations, it must be concluded that deadly force may be used to suppress a riot to the extent that such force is reasonable and necessary under the circumstances and non-deadly alternatives have either failed or are not reasonably available.

AUTHORITIES CONSIDERED:

1. *Idaho Code* §18-2505.
2. *Idaho Code* §18-4009 (4).
3. *Idaho Code* §18-4011.
4. *Idaho Code* §18-6401.
5. *Idaho Code* §18-6402.
6. *Idaho Code* §18-6407.
7. *Idaho Code* §19-224.
8. *Idaho Code* §19-225.
9. *Idaho Code* §19-610.
10. *Idaho Code* §20-209B.
11. *Idaho Code* §31-2202.
12. *Idaho Code* §31-2227.
13. *Ridley v. Leavitt*, 631 F.2d 358 (1980).
14. *Spain v. Procunier*, 600 F.2d 189 (1979).
15. *Burton v. Waller*, 502 F.2d 1261 (1974).
16. *Johnson v. Glick*, 481 F.2d 1028 (1973).
17. *Inmates of Attica v. Rockefeller*, 453 F.2d 12 (1971).
18. *LeBlanc v. Foti*, 487 F. Supp. 272 (1980).
19. *McCargo v. Mister*, 462 F. Supp. 813 (1978).
20. *Spain v. Procunier*, 408 F. Supp. 534 (1976).
21. *United States v. Williams*, 372 F. Supp. 1152 (1973).
22. *Collins v. Schoonfield*, 363 F. Supp. 1152 (1973).
23. *Smith v. United States*, 330 F. Supp. 867 (1971).
24. *Argentine v. McGinnis*, 311 F. Supp. 134 (1969).
25. *Heard v. Rizzo*, 281 F. Supp. 720 (1968).
26. *People v. Davis*, 67 Cal. Rptr., 547, 439 P.2d 651 (1968).
27. *State v. Boles*, 5. Conn. Cir. 22, 240 A. 2d 920 (1967).

28. *Kent v. Southern Ry. Co. et al.*, 184 S.E. 638 (Ga. 1936).
29. *City of Chicago v. Lambert*, 47 Ill. App. 2d 151, 197 N.E.2d 448 (1964).
30. *State v. Wilson*, 41 Idaho 616, 243 P. 359 (1925).
31. *State v. Smith*, 103 N.W. 944 (Iowa 1905).
32. *Harrah v. Leverette*, 271 S.E.2d 322 (W. Va. 1980).
33. 5 Am. Jur. 2d *Arrest*, §§81-84.
34. Annot. 83 A.L.R. 3d 174 §§ 2[a], 7[a].
35. Annot. 83 A.L.R. 3d 238.
36. 6A CJS *Arrest*, §49, p.113-15.
37. Palmer, *Constitutional Rights of Prisoners*, 2nd Ed., pp.15, 16.
38. *Restatement of the Law*, 2nd Ed., Torts 2d §142.
39. *the emerging Rights of the Confined*, [sic], S.C. Dept. of Corrections (1972), p.135.
40. Anderson, *Wharton's Criminal Law and Procedure*, §205.
41. Torcia, *Wharton's Criminal Law*, 14th Ed., §121.
42. *Wharton's Criminal Procedure*, 12th Ed. §81. p.200 n. 72.

DATED this 29th day of April, 1981.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

MBK/jci

ANALYSIS BY:

MICHAEL B. KENNEDY
Deputy Attorney General
Chief, Criminal Justice Division

ATTORNEY GENERAL OPINION NO. 81-10

TO: A. Kenneth Dunn
Director
Department of Water Resources

Per Request for Attorney General Opinion

QUESTION PRESENTED:

Are employees of the Department of Water Resources, who are designated by the department's director to issue the Idaho uniform citation while enforcing Title 42, Chapter 38, *Idaho Code*, "officials of the State of Idaho," as that term is used in *Idaho Code* §18-3302, the statute which generally prohibits the carrying of a concealed weapon?

CONCLUSION:

These employees are officials of the State of Idaho and fall within the "state officials" exception to the misdemeanor provisions of *Idaho Code* §18-3302.

ANALYSIS:

Idaho Code §18-3302 generally prohibits the carrying of a concealed weapon. The opening sentence contains the following exception to the statute's operation:

"If any person, excepting officials of the State of Idaho . . ."

Employees of the Department of Water Resources are empowered to issue the Idaho uniform citation while enforcing the Stream Channel Protection Act, *Idaho Code* §42-3801, et seq. *Idaho Code* §42-3812 provides:

The employees of the Department of Water Resources are hereby vested with the power and authority to enforce the provisions of Chapter 38, Title 42, *Idaho Code*, and rules and regulations promulgated pursuant to it. *Employees of the Department of Water Resources are empowered to issue Idaho uniform citations, as provided for by the rules of the court for magistrates division of the district court and district court, to violators of the provisions of chapter 38, title 42, Idaho Code, and rules and regulations promulgated pursuant to it.*

These department employees do not have the full panoply of peace officer powers but they may be described as quasi-peace officers.¹

Case law does not provide a foolproof definition of public or state official which is applicable in every jurisdiction and in every factual setting. The com-

¹See July 15, 1980 letter to Mr. Stephen Allred from Michael Kennedy and Howard Carsman, Deputy Attorneys General. The narrow question thus presented is whether employees of the department are "officials" of the State of Idaho when they are enforcing the Stream Channel Protection Act.

mon law definition of "officer," a term synonymous with public or state official, varies from jurisdiction to jurisdiction depending on the context in which the word is used. *Larson v. State*, 564 P.2d 365, 369 (Alaska 1977) (deputy court clerk is an "officer" as the term is used in criminal statute penalizing the theft of public records by an officer.) Cases which have discussed the definition of an officer have typically done so in an attempt to distinguish an officer from an ordinary employee; these cases have uniformly relied upon a set of characteristics which identify an officer. *Id.* In *Larson*, the court described the characteristics:

The most important characteristic of an office is that it involves a *delegation to the individual of 'some of the sovereign functions of government, to be exercised by him for the benefit of the public.'* [Citations omitted]. Second, an office is created by the constitution or authorized by statute. [Citations omitted]. Third, the duties of an office are prescribed by the constitution or by statute or 'necessarily inhere in and pertain to the administration of the office itself.' [Citation omitted]. Fourth, an office has permanence and continuity. [Citation omitted] (Emphasis added).

Two additional characteristics usually attach to an office but are not indispensable. These are an oath of office and a salary or fees fixed by law. [Citation omitted] (footnotes omitted). *Id.* at p.369.

To summarize, a public official has the following characteristics: (1) a delegation to the individual of some of the sovereign functions of government; (2) the position is created by the constitution or authorized by statute; (3) the duties are prescribed by the constitution or by statute or necessarily inhere in and pertain to the administration of the office itself; (4) the position has permanence and continuity. Two additional characteristics, an oath of office and a salary fixed by law, are not indispensable.

As the court stated in *Larson*, the most important factor is the delegation to the individual of some of the sovereign powers of the government. In accord: *State v. Jacobson*, 140 Mt. 221, 370 P.2d 483 (1962); *State v. Bode*, 342 Mo. 162, 113 S.W.2d 805 (1938); *State v. Dark*, 195 La. 139, 196 So. 47 (1940). In *State v. Sowards*, 64 O.Cr. 430, 82 P.2d 324 (1938), the defendant, a district maintenance superintendent of the State Highway Commission, was charged with a criminal offense involving misconduct in office. In holding that he was a public officer, the court described the sovereign powers which an officer exercises:

Public offices are created for the purpose of effecting the ends for which government has been instituted, which are the protection, safety, prosperity, and happiness of the people; and not the profit, honor, or private interest of any one man, family, or class of men. 82 P.2d at 330.

The court later concluded that persons "whose duties pertain to the exercise of the police power of the State are in that sense state officers. . . ." (emphasis added). *Id.* at 332. Similarly, in *Hirschfeld v. Commonwealth*, 256 Ky. 374, 76 S.W.2d 47 (1934), the court held that a city attorney was a public officer, for he enforced the criminal law:

One of the functions of government is the enforcement of its laws, and the particular individual selected by it (either by appointment or elec-

tion), who is charged with the duty of performing that task for his sovereignty, or the particular portion of it he serves, necessarily comes within the indicated requisite as one of the elements necessary to make his position an 'office' within the contemplation of the law, and to render its incumbent amenable to the law as an 'officer.' 76 S.W.2d at 49.

Employees of the Department of Water Resources who enforce the Stream Channel Protection Act under the auspices of *Idaho Code* §42-3812 exercise a portion of the state's sovereign power. The authority to enforce the misdemeanor provisions of Title 42, Chapter 38, *Idaho Code*, by issuing the Idaho uniform citation is a well-recognized example of a sovereign function — law enforcement. *Hirschfeld v. Commonwealth*, *supra*. They serve the public's interests by protecting Idaho's streams and rivers from alterations which would adversely affect fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, and water quality. See *Idaho Code* §42-3801. In protecting Idaho's natural resources, the department's employees may be likened to conservation officers, who have traditionally been classified as public officers. *State v. Bode*, *supra*. In *State v. Dark*, *supra*, the court stated:

Thus it may be seen that in creating Conservation Agents the legislature delegated to them a portion of the sovereign power and functions of the government which they exercise on behalf of and for the benefit of the public. Their duties are definite (they must enforce all of the laws of the state that have been enacted for the conservation and protection of the state's natural resources), regardless of the fact that some agents are assigned to a particular division of the department primarily charged with supervising only one type of our natural resources (such as forests, minerals, fish, etc.) while others are assigned to another of these divisions. Their duties are continuing, for, so long as the Department of Conservation remains in existence as a part of the executive branch of the state government, its laws must be enforced by these Conservation Agents, and it makes no difference, so far as the permanence and continuance of the position is concerned, that the salaries of these agents vary; that their number vary from time to time; or that an individual who is an agent and today occupies the position that was created by the legislature is superseded or changed tomorrow. 196 So. at 51, 52.

Whether regarded as law enforcement personnel or as conservation officers, employees of the Department of Water Resources who enforce the Stream Channel Protection Act exercise a portion of the state's sovereign power.

Idaho Code §42-3812 satisfies *Larson's* second and third criteria, which specify that the office must be created by the constitution or authorized by statute, and that the duties are described specifically by statute. Although *Idaho Code* §42-3812 expressly authorizes the department's employees to enforce the Stream Channel Protection Act, it does not create a specific office or position within the department to perform the enforcement duties. However, the statute does not fall short of creating an "office" within the department, for the legislature's intent may be inferred from a statute which delegates a portion of the sovereign power to the position. *State v. Sowards*, *supra*.

It is not necessary to the creation of an office that the legislature declare in express words that such an office is created. The use of any

language which shows the legislative intent to create the office is sufficient. *Id.* at 330.

Additionally, by its terms, *Idaho Code* §42-3812 plainly describes the duties of the department's employees: enforce Title 42, Chapter 38, *Idaho Code*.

Larson's fourth characteristic of an office is permanence and continuity. The court explained the meaning of this requirement:

Permanence and continuity mean the duties of the position are not specific to the individual filling that position, but endure irrespective of who fills it. 564 P.2d at 370.

Idaho Code §42-3812 does not designate named individuals to perform the specified duties, but rather empowers a class of persons, the department's employees, to enforce Title 42, Chapter 38. The positions will endure so long as the Stream Channel Protection Act remains in the *Idaho Code*.

Larson's final two requirements, oath of office and a salary fixed by law, are of less moment and need no protracted explanation other than the following quote from *Larson v. State*:

Two additional characteristics usually attach to an office but are not indispensable. These are an oath of office and a salary or fees fixed by law. [Citation omitted]. 564 P.2d at 369. In accord: *State v. Dark*, 196 So. at 50.

Employees of the Department of Water Resources who act pursuant to *Idaho Code* §42-3812 meet all four of the characteristics of a public officer. Most importantly, they are the delegates of a portion of the state's sovereign power.

The most important characteristic which distinguishes an office from an employment or contract is that the creation and conferring of an office involves a delegation to the individual of some of the sovereign functions of government, to be exercised by him for the benefit of the public; that some portion of the sovereignty of the country, either legislative, executive or judicial, attaches, for the time being, to be exercised for the public benefit. *Unless the powers conferred are of this nature, the individual is not a public officer.* (Emphasis supplied) [Citations omitted].

State v. Jacobson, 370 P.2d at 485. The department's employees are state officials when they are enforcing the Stream Channel Protection Act, and would not be subject to criminal prosecution, under *Idaho Code* §18-3302, for carrying a concealed weapon.

AUTHORITIES CONSIDERED:

1. *Idaho Code* §18-3302.
2. *Idaho Code* §42-3801, 3812.
3. *Larson v. State*, 564 P.2d 365, (Alaska 1977).
4. *State v. Jacobson*, 140 Mt. 221, 370 P.2d 483 (1962).

5. *State v. Dark*, 195 La. 139, 196 So. 47 (1940).
6. *State v. Bode*, 342 Mo. 162, 113 S.W.2d 805 (1938).
7. *State v. Sowards*, 60 O. Cr. 430, 82 P.2d 324 (1938).
8. *Hirschfeld v. Commonwealth*, 256 Ky. 374, 76 S.W.2d 47 (1934).

DATED this 19th day of May, 1981.

ATTORNEY GENERAL
State of Idaho
/s/DAVID H. LEROY

HC/jh

ANALYSIS BY:

HOWARD CARSMAN
Deputy Attorney General

cc: Idaho Supreme Court
Idaho Supreme Court Law Library
Idaho State Library

ATTORNEY GENERAL OPINION NO. 81-11

TO: Vivian E. O'Loughlin
Registrar
Public Works Contractors State
License Board
Statehouse Mail

Per Request for Attorney General Opinion

QUESTIONS PRESENTED:

1. Is it legal for a subcontractor or specialty contractor to upgrade his license in order to accept a contract from a general contractor when said subcontractor or specialty contractor was not licensed in the proper class or type at the time of the original bid opening?

2. Is it legal for a general contractor to award a subcontract if the subcontractor was not licensed in the proper class and type at the time of the original bid opening?

CONCLUSION:

Yes to both questions, but if the subcontractor or specialty contractor is of the type required to be named under the "Naming" provisions of *Idaho Code*

§67-2310 the upgrade will not save the bid from being void and unresponsive. ATTORNEY GENERAL OPINION NOS. 3-56, 5-57, and 60-75, to the extent they conflict with this opinion, are OVERRULED AND SUPERSEDED.

ANALYSIS:

At the outset, it is necessary for purposes of answering your questions, to distinguish plumbing, electrical, and heating and air conditioning contractors from the other types of contractors. This is because in the miscellaneous provisions of Title 67, Chapter 23, *Idaho Code*, specifically §67-2310, the types listed above are required to be named by the general contractor in his bid to a public entity. If at the bid opening these contractors do not possess the appropriate public works contractor's license, the bid is "unresponsive and void." *Idaho Code* §67-2310. As such, it cannot qualify as a "responsible bid" for purposes of awarding a contract to the "lowest responsible bidder," and this defect cannot be waived by the contracting authority. *Neilsen & Co. v. Cassia & Twin Falls Cty. School Dist.*, 96 Idaho 763, 536 P.2d 1113 (1975). In such a case, under the *Neilsen* decision, the contracting authority, at its option, must reject that bid and accept the next lowest responsible bid or readvertise and seek new bids on the project. *Neilsen, supra*, at 766.

It should be noted before examining the law covering subcontractors and specialty contractors who are not subject to the "naming" statute, that the reason a bid which names a non-certified subcontractor is unresponsive and void under *Idaho Code* §67-2310 is because that statute clearly and expressly says so.

Failure to name subcontractors [plumbing, heating and electrical] as required by the section shall render any bid submitted by a general contractor unresponsive and void. (Material inserted).

There is no such proscription in the law, either under the Public Works Contractors License Act or elsewhere, for those contractors who are not covered by the "naming" law, however, and we reach a different result regarding the questions of whether their credentials can be upgraded after the bid opening, and whether the general contractor can award them a subcontract upon their upgraded license. We conclude in both instances that it is permissible to do so.

The following appears upon our examination of the Public Works Contractors License Act, compiled in *Idaho Code* §§54-1901 through 54-1924.

This licensing act is penal in nature as a matter of law, in that it can subject a person without a license to a misdemeanor penalty. *Idaho Code* §54-1920. Indeed, under that section an employee of a government entity who knowingly lets a contract to a person who does not hold an appropriate license, is also subject to a misdemeanor. In addition to the criminal penalties, on the civil side, said statute provides that an improperly licensed contractor may forfeit the enforceability of his contract in the courts. Consequently, if there is any doubt as to its terms,

it is an ancient rule of statutory construction that penal statutes should be strictly construed against the government and in favor of persons upon whom the penalties may fall. 3 Sutherland, *Statutory Construction* §59.03, at 6 (4th Ed. 1972).

This concept has long been the rule in Idaho. *Latah Cty. School Dist. v. Collins*, 15 Idaho 535, 98 P.857 (1908); *In re Dampner*, 46 Idaho 195, 267 P.452 (1928).

In addition to the rule stated next above, two other rules of statutory interpretation are equally applicable and must be observed. The first is that all related sections of legislation should be considered and construed as a whole. *First American Title Co. v. Clark*, 99 Idaho 10, 576 P.2d 581 (1978). An even more applicable variant of that rule is that where a statute is uncertain such that a person cannot determine in advance what he may or may not do thereunder, no single provision thereof should be separated and construed alone, and all portions of the act should be resorted to in aid of interpretation. *State v. Mead*, 61 Idaho 449, 102 P.2d 915 (1940).

Beginning the analysis, *Idaho Code* §54-1902 states in pertinent part:

It shall be unlawful for any person to engage in the business or act in the capacity of a public works contractor within this state without first obtaining and having a license therefor, as herein provided, . . .

Under the salient language of *Idaho Code* §54-1901(b) a person acts in the capacity of a "public works contractor" when he:

. . . in any capacity, undertakes to, . . . submit a proposal to, or enter into a contract with, the state of Idaho, or any county, city, town, village, school district, irrigation district, drainage district, sewer district, fire district, or any other taxing subdivision or district of any public or quasi public corporation of the state, or with any agency of any thereof, or with any other public board, body, commission, department or agency, or officer or representative thereof, authorized to let or award contracts for the construction, repair or reconstruction of any public work.

The above quoted language, through its definition of "Public Works Contractor" coupled with §54-1902, only prohibits a contractor from submitting a proposal or entering into a contract with a public entity or its representative without first having the proper license. It does not speak to the proposition of one contractor entering into a contract with another concerning the project.

A statute will not be extended to include situations by implication when the language of the statute is specific and not subject of reasonable doubt. 2 Sutherland, *supra*, §55.03 at 383.

As between contractors, however, *Idaho Code* §54-1902 goes on to say:

[It shall be unlawful] . . . for any public works contractor to subcontract . . . *the work under any contract to be performed by him* . . . or to sublet any part of any contract for specialty construction to a specialty contractor who is not licensed in accordance with this act; . . . (Insert and emphasis added).

This portion of §54-1902, prohibits a prime contractor from subletting work under a contract he is to perform to another contractor who is not properly licensed to do that work. But the underlined language contemplates that the prime contractor has already been awarded the contract which, of course,

comes after the bid opening. Consequently, this language does not require a subcontractor or specialty contractor to have the upgraded license before the bid opening, but only before he enters into a contract with the prime contractor.

It is also worthy of note that the specific provision in the Act authorizing a license upgrade places no restriction on when it may be sought or granted in reference to the bid opening. *Idaho Code* §54-1904 provides:

... that the board may extend the permissible type or scope of work to be done under any license when it is determined by the board that the applicant meets all of the requirements of this act to qualify him to do such other work.

We suppose, as earlier opinions have accepted,¹ that language in §54-1901, which provides that the term "Public Works Contractor" is synonymous with the terms "builder", "sub-contractor" and "specialty contractor", arguably creates an ambiguity as to whether subcontractors or specialty contractors are brought within the scope of the prohibition even if neither contractor bids to the public entity. First, this argument ignores the rule that intention is to be collected from the context and literal language of the statute. *Noble v. Glenns Ferry Bank, Ltd.*, 91 Idaho 364, 421 P.2d 444 (1966). Further, this supposed ambiguity is not sufficient to disregard the clear language of the legislature and find regulation when none is provided.

We think the following three cases serve to illustrate our conclusions in this regard. In *State v. Mitchell*, 217 N.C. 244, 7 S.E. 2d 567 (1940), the question was whether a plumber had violated a statute relating to the licensing of plumbing and heating contractors which exacted a criminal penalty for its violation. The court commented:

But let us concede that the language used in defining plumbing is ambiguous and that, as contended by the State, the term not only includes the plumbing system as such but likewise may be interpreted so as to embrace the constituent parts thereof separately and distinctly from the system as a whole. Then we are faced by well recognized and firmly established rules of construction which preclude the adoption of this interpretation.

It is a criminal statute, penal in its nature, and must be strictly construed against the State and in favor of the defendant. At 571.

It then held:

... We may not give to an act of the Legislature a meaning which would be so restrictive of personal liberty unless the language thereof is clear and explicit and it permits of no other reasonable interpretation. At 570.

In a similar fashion, in *Sellers v. Bles*, 198 Va. 49, 92 S.E. 2d 486 (1956), the Virginia Supreme Court was called upon to construe Virginia's Contractor Registration Act. The issue was whether, in view of the nature and dollar

¹See for example Attorney General Opinion Nos. 3-56 and 5-57, *infra*.

amount of the work, the plaintiff had engaged in the kind of undertaking as would require that he register under the Act. The court stated:

The act in question is also penal, and for that reason, in applying its penal provision or giving effect to its sanctions, strict construction is required.

"This is a penal ordinance, and is therefore to be construed strictly. It is not to be extended by implication, and must be limited in its application to cases clearly described by the language employed. The books abound with cases illustrating this principle, which is of universal application, except in particular instances in which the doctrine has been modified by statute." [Citations omitted].

....

... Certainly a fair and reasonable application of §54-113(2) to the facts of this case under the principles of construction and interpretation applicable to this statute would demand a finding that their undertaking was not within the letter or spirit of the penal provisions of the statute. At 491.

A 1977 California case, *Martin v. Mitchell Cement Contracting Co., Inc.*, 140 Cal. Rptr. 424, 74 Cal. App. 3d 15, is most instructive because of the facts, the arguments of the parties, and the court's ruling. Plaintiff was a general contractor, and licensed as such. He took a subcontract from the defendant for masonry work only. Plaintiff did not have a specialty license for masonry work. Defendant contended plaintiff was required to have such a specialty license under a regulation of the licensing board which provided:

A licensee classified as a general building contractor as defined in Section 7057 [Business and Professions Code], shall not take a prime contract unless the same requires more than two unrelated building trades or crafts, *or unless he has qualified for the particular specialty classification* or classifications established by the Board. [Emphasis added]. At 426.

The court very curtly commented:

As applied to the facts of this case, the argument is without merit. By its terms, that rule applies only to "prime" contracts. The contract here was a subcontract and thus not a contract covered by that rule . . . At 426.

Finally, in reaching our conclusions, we are not passing judgment on whether an artisan should be "locked in" to the grade of license he holds at the time of the bid opening as opposed to the time he enters into the contract with the prime contractor and begins work.² That is a matter for the sound discretion of the legislature:

²There may be compelling factual reasons for preferring a status after the bid opening at a time where the nature and dollar amount of the work involved is more precise, or where the prime contractor contracts for the subproject after the bid opening, or where the prime contractor changes subcontractors after the bid opening. Such factual matters are not necessary for our opinion, however, and are better left to the legislature for determination.

The burden lies upon the law makers and inasmuch as it is within their power, it is their duty to relieve the situation of all doubts. 3 Sutherland, *supra*, §59.03 at 7, quoting *Snitken v. United States*, 265 F. 489, 494 (CA7 1920).

The statute, as presently written, is not susceptible of that result.

In summary, it is our conclusion that a subcontractor (other than a subcontractor or a specialty contractor, named in accordance with the naming statute), may upgrade his license after the bid opening in order to accept a contract from a general contractor. By the same token, upon the same reservation, a general contractor may award a contract to a properly licensed subcontractor or specialty contractor even though the recipient did not possess the appropriate license to do that work at the time of the bid opening.

In requesting an opinion on these questions, you have referred to earlier opinions and guidelines of the Attorney General, and the need to resolve the conflicts or confusion which might result from having opined so often about related topics. The relevant opinions and guidelines are:

Attorney General Opinion No. 3-56, dated April 11, 1956, by Attorney General Graydon Smith.

Attorney General Opinion No. 5-57, dated June 14, 1957, by Attorney General Graydon Smith.

Attorney General Opinion No. 60-75, dated Oct. 20, 1975, by Attorney General Wayne Kidwell.

Informal Guideline, dated Sept. 27, 1976, to Paul Pusey, Asst. Registrar, Public Works Contractors License Board, by Deputy Attorney General Guy Hurlbutt.

Attorney General Opinion No. 77-24, dated March 25, 1977, by Attorney General Wayne Kidwell.

Taking them in reverse order, OPINION NO. 77-24, deals *inter alia*, with the time a general contractor who lists himself as a "named" electrical subcontractor under the naming provisions of *Idaho Code* §67-2310 needs an electrician's license. Since this opinion acknowledges that "named" subcontractors need a proper public works license at the time of the bid, Opinion 77-24 is not in conflict.

The INFORMAL GUIDELINE of Guy Hurlbutt to Paul Pusey, of September 27, 1976, dealt with a fact situation where a contractor did not possess the appropriate public works license at the time of *his bid to a public entity*. Since this guideline acknowledges that a contractor who bids to a public entity is a "public works contractor," and since this opinion deals with a contractor who contracts with another contractor, this guideline is not in conflict with this opinion.

OPINION NO. 60-75, to the extent it concludes a prime contractor may not award a subcontract to a specialty contractor who did not possess a proper

license at the time of the original bid, (unless the specialty contractor is required to be named under *Idaho Code* §67-2310), is hereby OVERRULED AND SUPERSEDED.

OPINION NO. 5-57, to the extent it concludes that a subcontractor who does not submit a proposal to or enters a contract with a public entity but who deals only with the prime contractor, is nevertheless a "public works contractor" is OVERRULED AND SUPERSEDED.

OPINION NO. 3-56, to the extent it concludes that language in the Act making the term "public works contractor" synonymous with the terms "builder", "subcontractor" and "specialty contractor" is sufficient to make one who does not bid or contract with a public entity a "public works contractor" is OVERRULED AND SUPERSEDED.

AUTHORITIES CONSIDERED:

1. *Martin v. Mitchell Cement Contracting Co.*, 140 Cal. Rptr. 424, 74 Cal. App. 3d 18 (1977).
2. *First American Title Co. v. Clark*, 99 Idaho 10, 576 P.2d 581 (1978).
3. *Neilsen & Co. v. Cassia & Twin Falls Cty. School Dist.*, 96 Idaho 763, 536 P.2d 1113 (1975).
4. *Noble v. Glenns Ferry Bank, Ltd.*, 91 Idaho 364, 421 P.2d 444 (1966).
5. *State v. Mead*, 61 Idaho 449, 102 P.2d 915 (1940).
6. *In re Damprer*, 46 Idaho 195, 267 P.452 (1928).
7. *Latah Cty. School Dist. v. Collins*, 15 Idaho 535, 98 P.857 (1908).
8. *State v. Mitchell*, 217 N.C. 244, 7 S.E. 2d 567 (1940).
9. *Sellers v. Bles*, 198 Va. 49, 92 S.E. 2d 486 (1956).
10. *Idaho Code* §§54-1901 through 54-1924, 67-2310.
11. 2A Sutherland, *Statutory Construction* §55.03 (4th Ed. 1972).
12. 3 Sutherland, *Statutory Construction* §59.03 (4th Ed. 1972).
13. Idaho Attorney General Opinion Nos. 3-56, 5-57, 60-75, 77-24.
14. Idaho Attorney General Informal Guideline to Paul Pusey, dated Sept. 27, 1976.

DATED this 22nd day of May, 1981.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

DHL/TCF/RLE/lb

ANALYSIS BY:

THOMAS C. FROST
Deputy Attorney General
Chief, Administrative Law and
Litigation Division

ROY L. EIGUREN
Deputy Attorney General
Chief, Legislative/Administrative
Division

cc: Idaho State Library
Idaho Supreme Court
Idaho Supreme Court Law Library

ATTORNEY GENERAL OPINION NO. 81-12

TO: The Honorable William L. Floyd
State Senator
District 31
Post Office Box 974
Idaho Falls, Idaho 83401

Per Request for Attorney General Opinion

QUESTIONS PRESENTED:

1. Does a directive of the State Tax Commission to the effect that the county assessors value all taxable real property for tax assessment purposes at 1978 market values plus 2% per year inflationary increase for 1979 and 1980, if in fact the actual fair market value of a particular parcel of property has *decreased* since 1978, violate the just valuation requirement of Article 7, §5, Idaho Constitution?

2. If such a directive does violate Article 7, §5, Idaho Constitution, as applied to particular individual properties, does a county assessor have the authority to determine the actual fair market value and assess the property accordingly, notwithstanding the State Tax Commission directive?

CONCLUSIONS:

1. Although actual fair market value is the touchstone of property valuation for *ad valorem* tax purposes under Article 7, §5, Idaho Constitution, the courts do permit some deviation from the constitutional requirements where the disparities are of a temporary nature resulting from a systematic plan for revaluation of all taxable properties at fair market value within a reasonable time. Depending upon the particular factual situation, however, it is possible that the courts would hold a particular assessment of property which has in fact decreased in value since 1978 to be excessive and invalid, as violating either the just valuation requirement of Article 7, §5, or the uniform taxation requirements of Article 7, §§2 and 5, Idaho Constitution.

2. In light of the general rule that public ministerial officers lack the necessary standing to challenge applicable laws and regulations of the state on constitutional grounds, we view it as more likely than not that county assessors could not lawfully ignore or challenge an otherwise valid directive of the State Tax Commission and must comply with the directive unless and until the directive is held invalid by the courts. However, an individual taxpayer would have standing to challenge his particular assessment.

ANALYSIS:

Several Idaho constitutional and statutory provisions are pertinent to the issues presented here.

Idaho Constitution, Article 7, §2, provides:

§2. Revenue to be provided by taxation — The legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person or corporation shall pay a tax in proportion to the value of his, her, or its property, except as in this article hereinafter otherwise provided. The legislature may also impose a license tax, both upon natural persons and upon corporations, other than municipal, doing business in this state; also a per capita tax: provided, the legislature may exempt a limited amount of improvements upon land from taxation.

Article 7, §5, Idaho Constitution, provides:

§5. Taxes to be uniform — Exemptions. — All taxes shall be uniform upon the same class of subjects within the territorial limits, of the authority levying the tax, and shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal: provided, that the legislature may allow such exemptions from taxation from time to time as shall seem necessary and just, and all existing exemptions provided by the laws of the territory, shall continue until changed by the legislature of the state: provided further, that duplicate taxation of property for the same purpose during the same year, is hereby prohibited.

Article 7, §12, Idaho Constitution, creates the State Tax Commission and provides that it shall have such powers and perform such other duties as may be prescribed by law, "... including the supervision and coordination of the work of the several county boards of equalization." This section further provides that the board of county commissioners of the counties of the state shall constitute boards of equalization for their respective counties, "... whose duty it shall be to equalize the valuation of the taxable property in the county, under such rules and regulations of the state tax commission as shall be prescribed by law."

Idaho Code §63-111 provides:

63-111. Terms to be construed as market value. — For purposes of appraisal, assessment and taxation of property in Title 63, *Idaho Code*, the terms "assessed value," "assessed valuation," "value,"

“valuation,” “cash value,” “full cash value,” “true value,” and “true cash value” shall mean “market value for assessment purposes,” as defined by rules and regulations of the State Tax Commission.

Idaho Code §63-202 provides:

63-202. Rules and regulations pertaining to market value — Duty of assessors. — It shall be the duty of the State Tax Commission to prepare and distribute to each county assessor and each board of county commissioners within the state of Idaho, rules and regulations prescribing and directing the manner in which market value for assessment purposes is to be determined for the purpose of taxation. The rules and regulations promulgated by the State Tax Commission shall require each assessor to find market value for assessment purposes of all property within his county according to recognized appraisal methods and techniques as set forth by the State Tax Commission; provided, that the actual and functional use shall be a major consideration when determining market value for assessment purposes.

To maximize uniformity and equity in assessment of different categories of property, such rules and regulations shall, to the extent practical, require the use of reproduction or replacement cost less depreciation as opposed to historic cost less depreciation whenever cost is considered as a single or one of several factors in establishing the market value of depreciable property. The State Tax Commission shall also prepare and distribute from time to time amendments and changes to the rules and regulations as shall be necessary in order to carry out the intent and purposes of this act. The rules and regulations shall be in the form as the Commission shall direct, and shall be made available upon request to other public officers and the general public in reasonable quantities without charge. In ascertaining the market value for assessment purposes of any item of property, the assessor of each county shall, and hereby is required to, abide by, adhere to and conform with rules and regulations hereinabove required to be promulgated by the State Tax Commission.

Idaho Code §63-202A provides that every public officer shall comply with any lawful order, rule or regulation of the State Tax Commission made pursuant to the provisions of Title 63, *Idaho Code*.

Idaho Code §63-306 provides that the assessor shall assess all taxable real and personal property and shall actually determine, as near as practicable, the market value for assessment purposes of each tract or piece of real property assessed.

Idaho Code §63-513 provides, in part, that, in addition to all other powers and duties vested in it, the State Tax Commission shall have power, and it shall be its duty:

“(1) To supervise and coordinate the work of the several county boards of equalization.

* * *

(3) To have and exercise general supervision of the system of ad valorem taxation throughout the state.

* * *

(5) To issue instructions and directions to the county assessors and county boards of equalization as to the methods best calculated to secure uniformity in the system of assessment and equalization of taxes, to the end that all property shall be assessed and taxed as required by law."

Idaho Code §63-923(2) (1981 amendment, effective January 1, 1981), provides:

The market value for assessment purposes of real and personal property subject to appraisal by the county assessor shall be determined by the county assessor according to the rules and regulations prescribed by the State Tax Commission, as provided in §63-202, *Idaho Code*, but where real property is concerned it shall be the actual and functional use of the real property. All taxable property which has not been appraised at market value levels shall be reappraised or indexed to reflect that valuation.

Prior to the 1981 amendment, *Idaho Code* §63-923(2) provided for appraisal at 1978 market value levels, and further provided that the 1978 market values for assessment purposes shall be adjusted from year to year to reflect the inflationary rate but at a rate not to exceed two percent for any given year.

(1) Certain legal principles are firmly established by the decisions of the Idaho Supreme Court. It is well established in Idaho that the valuation of taxable property for assessment purposes must reasonably approximate the fair market value of the property in order to effectuate the policy of *Idaho Constitution* Article 7, §5, that each taxpayer's property bear its just proportion of the property tax burden. *Merris v. Ada County*, 100 Idaho 59, 593 P.2d 394 (1979). Under the constitutional and statutory provisions, it has been held that the only criterion for determining the value of property for ad valorem tax purposes is the full cash or market value. *Merris v. Ada County, supra*; *Janss Corp. v. Board of Equalization of Blaine County*, 93 Idaho 928, 478 P.2d 878 (1970); *Abbott v. State Tax Commission*, 88 Idaho 200, 398 P.2d 221 (1965); *Boise Community Hotel, Inc. v. Board of Equalization*, 87 Idaho 152, 391 P.2d 840 (1964). The touchstone in the appraisal of property for ad valorem tax purposes is the fair market value of the property, and fair market value must result from application of the chosen method of appraisal. *Merris v. Ada County, supra*; *In re Farmer's Appeal*, 80 Idaho 72, 325 P.2d 278 (1958). An arbitrary valuation which does not reflect fair market value or full cash value of the property will not be upheld, even if it be the result of application of one of the approved methods of appraisal set out in State Tax Commission regulations. *Merris v. Ada County, supra*; *Boise Community Hotel, Inc. v. Board of Equalization, supra*; *In re Farmer's Appeal, supra*. The courts will grant relief where the valuation fixed by the assessor is manifestly excessive, fraudulent, oppressive, or arbitrary, capricious, and erroneous resulting in discrimination against the taxpayer. *Justus v. Board of Equalization of Kootenai County*, 101 Idaho 743, 620 P.2d 777 (1980); *Merris v. Ada County, supra*; *C.C. Anderson Stores, Inc. v. State Tax Commission*, 86 Idaho 249, 384 P.2d 677 (1963); *Appeal of Sears, Roebuck and Co.*, 74 Idaho 39, 256 P.2d 526 (1953); *Anderson's Red & White Store v. Kootenai County*, 70 Idaho 260, 215 P.2d 815 (1950); *Northern Pacific Ry. Co. v. Clearwater County*, 26 Idaho 455, 144 P. 1 (1914).

Many of these and other cases were considered and set forth in Attorney General Opinion No. 79-16 (July 17, 1979), in which we considered the constitutionality, under Idaho Constitution Article 7, §5, of the "2% cap" on inflationary increases in real property valuation contained in the original 1% Initiative. We concluded in that opinion that a valuation system with an artificial inflationary limit of 2% per year during years of higher rates of actual inflation will ultimately violate both the "just valuation" provision of Article 7, §5, and the uniform taxation requirements of Article 7, §§2 and 5. We based this conclusion upon the premise that the constitution itself requires valuation at full actual current market value. *Washington County v. First National Bank of Weiser*, 35 Idaho 438, 206 P. 1054 (1922); *Merris v. Ada County*, 100 Idaho 59, 593 P.2d 394 (1979); *Kittery Elec. Light Co. v. Assessors of Town of Kittery*, 219 A.2d 728 (Maine 1966); *Fruit Growers Express Co. v. Brett*, 22 P.2d 171 (Mont. 1933). We adhere to the view expressed in that opinion, to the effect that the Idaho Constitution itself requires that valuation of property for *ad valorem* tax purposes be the actual market value of the property.

The Idaho Supreme Court has also held that there is no one factor which can be said to be the key to the proper appraisal of taxable property; that in determining the value of property for taxation purposes, the assessor may and should consider cost, location, actual sale value, and all other factors, known or available to his knowledge, which affect the value of the property assessed, to the end that the property of each taxpayer will bear its just proportion of the burden of taxation. *Merris v. Ada County*, 100 Idaho 59, 593 P.2d 394 (1979); *Janss Corp. v. Board of Equalization of Blaine County*, 93 Idaho 928, 478 P.2d 878 (1970); *Abbott v. State Tax Comm.*, 88 Idaho 200, 398 P.2d 221 (1965); *Anderson's Red & White Store v. Kootenai County*, 70 Idaho 260, 215 P.2d 815 (1950); *In re Farmer's Appeal*, 80 Idaho 72, 325 P.2d 278 (1958).

In addition, all property must be assessed uniformly. Although the legislature may create reasonable classifications of property and apply different methods of valuation, to the end that just valuation at actual market value is achieved, it has been held that Article 7, §2, Idaho Constitution, is violated when one class of property is systematically assessed at a higher percentage of actual cash value, thereby subjecting the taxpayer to a higher rate of taxation than applies to other property within the taxing jurisdiction. *Idaho Telephone Co. v. Baird*, 91 Idaho 425, 523 P.2d 337 (1967); *In re Farmer's Appeal*, 80 Idaho 72, 325 P.2d 278 (1958); *Chastain's, Inc. v. State Tax Comm.* 72 Idaho 344, 241 P.2d 167 (1952); *Anderson's Red & White Store v. Kootenai County*, 70 Idaho 260, 215 P.2d 815 (1950). Where a *prima facie* case of discrimination is established, the assessor must produce evidence to support his assessment. *Boise Community Hotel, Inc. v. Board of Equalization*, 87 Idaho 152, 391 P.2d 840 (1964). Even though the method used by the assessor is uniform, it will not be upheld where it results in erroneous valuation. *Merris v. Ada County*, 100 Idaho 59, 593 P.2d 394 (1979).

On the other hand, it has been held in many cases that, while absolute accuracy and uniformity are the ideal, such an ideal is, as a practical matter, unattainable. *Justus v. Board of Equalization of Kootenai County*, 101 Idaho 743, 620 P.2d 777 (1980); *Title and Trust Co., Etc. v. Board of Equalization of Ada County*, 94 Idaho 270, 486 P.2d 281 (1971); *Anderson's Red & White Store v. Kootenai County*, 70 Idaho 260, 215 P.2d 815 (1950). While no Idaho Supreme Court decision has upheld the systematic overvaluation of property, or systematic disparities in valuation of similar properties, it has upheld temporary disuniformities in valuation in certain limited circumstances. Thus, in *Justus v.*

Board of Equalization of Kootenai County, supra, the Court, considering a challenge to a multi-year revaluation plan under which some properties were brought to full market value sooner than others, stated:

In determining whether a revaluation plan meets constitutional standards of equality and uniformity, all relevant circumstances should be taken into consideration. Several factors pertinent to the above determination are: the limitations of time and staff; the nature and extent of existing inequities in the tax rolls; the extent to which such existing inequities are rectified by the plan; the amount and duration of temporary disparities under the plan; available alternatives; and whether nonimplementation of the plan would perpetuate existing inequities . . .

Tested against the considerations set forth above, the Kootenai County revaluation plan did not violate the uniformity provision of the Idaho Constitution or the equal protection clause of the United States Constitution. 620 P.2d at 781.

The Court went on to say:

Kootenai County was confronted with a problem: gross inequities in the existing tax rolls caused by inflation, growth and lack of an established program of revaluation. The taxing authorities have come up with an orderly, systematic and nondiscriminatory solution. They devised a plan intended to rectify the greatest inequities in the shortest amount of time. They revalued the majority of the property in year one, the remainder (except commercial improvements) in year two, and achieved a uniform base in year three . . .

We therefore affirm the district court's conclusion that the revaluation plan commenced by the Kootenai County assessor in 1977 is systematic, consistent, coherent, orderly, nondiscriminatory and in compliance with pertinent statutes and the Idaho and United States Constitutions.

620 P.2d 783. No contention was made in this case that any properties were valued at *more* than their actual fair market values; the complaining taxpayers' contention was that not all properties were being assessed at full market value and that they were thus being discriminated against. The Court answered this by saying that the revaluation plan was systematic and would, within a reasonable time, result in uniform valuation of all property at full market value, and, in the meantime, a certain amount of discrimination would be tolerated. Other cases have likewise held that, in light of significant limitations of time and staff, and the magnitude of effort required to inspect and appraise each individual property in the county, absolute accuracy and uniformity is not required. *Title and Trust Co., Etc. v. Board of Equalization of Ada County*, 94 Idaho 270, 486 P.2d 281 (1971).

House Bill 389 passed the 1981 Legislature and became law on March 6, 1981. By eliminating the "two percent cap" that act presented the State Tax Commission with a problem similar to that described by the Court in the *Justus* decision. The existing tax rolls were prepared in accordance with prior statutes and reflected 1978 market values plus the two percent inflation index. Revaluation of all property in the state to 1981 market values is a massive job.

The 1981 tax rolls must be completed by the assessor and delivered to the county clerk on June 22, 1981. See *Idaho Code* §63-322. Any attempt to value property at 1981 market values levels in such a short period of time will necessarily be highly selective. To value a few taxpayers' property at 1981 market value while retaining the adjusted 1978 market value for other taxpayers creates its own problems of disuniformity and inequity. Some Idaho Supreme Court decisions hold that the requirement that property be assessed at its actual cash value is secondary to the constitutional mandate of equality of taxation. *Washington County v. First National Bank of Weiser*, 35 Idaho 438, 444, 206 P. 1054 (1922); *Boise Community Hotel, Inc. v. Board of Equalization*, 87 Idaho 152, 160, 391 P.2d 840 (1964). See also: *In re Farmer's Appeal*, 80 Idaho 72, 79, 325 P.2d 278 (1958); *Anderson's Red & White Store v. Kootenai County*, 70 Idaho 260, 265, 215 P.2d 815 (1950). A policy of selective revaluation might even be viewed as discriminatory enforcement. The tax commission's solution of this problem — that is to apply the two percent index for one additional year while necessary reappraisal work is accomplished to achieve full market value statewide — can well be viewed as "an orderly, systematic and nondiscriminatory solution . . . intended to rectify the greatest inequities in the shortest amount of time." The tax commission's solution may also resolve difficult technical problems relating to the uniformity of levies imposed by multicounty taxing districts. For example, this problem is particularly acute in Bonneville County with its four joint school districts. Maintaining values at the adjusted 1978 levels may avoid disparities resulting from differing practices in neighboring counties resulting in similarly situated taxpayers paying disproportionate school district taxes.

In addition to the tolerance for temporary inequities resulting from a systematic revaluation plan exemplified in the *Justus* case above, the Court has recognized and adhered to certain other doctrines to uphold valuations in particular cases. It is well established, for example, that a tax statute is presumed to be constitutional and valid. *School Dist. No. 25 v. State Tax Commission*, 101 Idaho 283, 612 P.2d 126 (1980). The assessor's valuation is presumed to be correct and constitutional, and the burden of proof is on the taxpayer to show by clear and convincing evidence that he is entitled to relief. *Justus v. Board of Equalization of Kootenai County*, *supra*; *Merris v. Ada County*, 100 Idaho 59, 593 P.2d 394 (1979); *Title and Trust Co. v. Board of Equalization of Ada County*, *supra*; *Abbott v. State Tax Commission*, 88 Idaho 200, 398 P.2d 221 (1965); *Appeal of Sears, Roebuck and Co.*, 74 Idaho 39, 256 P.2d 526 (1953); *Humbird Lumber Co. v. Thompson*, 11 Idaho 614, 83 P. 941 (1905). The courts will not correct mere mistakes or errors of judgment on the part of the assessor, but will grant relief only where the valuation fixed by the assessor is manifestly excessive, fraudulent, oppressive, or arbitrary, capricious, and erroneous. *C. C. Anderson Stores Co. v. State Tax Commission*, 86 Idaho 249, 384 P.2d 677 (1963); *Appeal of Sears, Roebuck and Co.*, 74 Idaho 39, 256 P.2d 526 (1953); *Anderson's Red & White Store v. Kootenai County*, 70 Idaho 260, 215 P.2d 815 (1950).

Thus, while the decisions of the Idaho Supreme Court make it clear that the Idaho Constitution requires that valuation of property for *ad valorem* tax purposes be at fair and full market value and that assessment methods result in uniform taxation, it is equally clear that some leeway is granted to the taxing authorities; that a presumption exists in favor of the validity of the valuation arrived at; that mere mistakes in judgment involving particular properties will not readily be set aside by the courts; and that, where the taxing authorities have adopted a systematic revaluation plan, some temporary disparities will be tolerated.

The issue presented to us is whether, in light of these principles, a directive of the State Tax Commission requiring each individual parcel of property to be valued at 1978 market value, plus an increase in valuation of 2% per year for 1979 and 1980, is constitutional even if the value of the property has in fact decreased since 1978. The answer will necessarily depend upon the amount of the decrease, the percentage of difference between the actual fair market value and the value dictated by the tax commission directive, and the tax impact of that difference as applied to the particular property being considered. These are, of course, questions of fact arising in each individual situation, which would have to be determined by the Board of Equalization, Board of Tax Appeals, or the district court.

Nevertheless, it is our opinion that, if it can be established by clear and convincing proof that such a large disparity between the actual value of the property and the value dictated by the directive exists as to indicate a valuation which is manifestly excessive, fraudulent, oppressive, or arbitrary, capricious, and erroneous, it would be held invalid *unless* the administrative body or court were to find that the inequity is of a temporary nature resulting from a systematic revaluation plan mandated by *Idaho Code* §63-923 (the "1% Initiative"). (It should be noted that *Idaho Code* §63-923(2)(a), as it existed prior to January 1, 1981, directed that all taxable property which has not been appraised at 1978 market value levels shall be reappraised or indexed to reflect that valuation for the tax year commencing January 1, 1980.)

Whether a particular valuation would be regarded as clearly excessive, oppressive, or arbitrary would, again, depend upon the particular facts of the individual case. The Idaho Supreme Court has held particular assessments to be unreasonable in several situations. In *Merris v. Ada County*, 100 Idaho 59, 593 P.2d 394 (1979), application of the county and tax commission's method of valuation resulted in an increase in assessed valuation from \$33,900 to \$108,928 in one year, or more than three times the amount the taxpayer claimed to be correct. In *C.C. Anderson Stores Co. v. State Tax Commission*, 91 Idaho 413, 422 P.2d 337 (1967), property assessed at \$236,000 was found to be worth \$121,516, or approximately one-half. In *Boise Community Hotel, Inc. v. Board of Equalization*, 87 Idaho 152, 391 P.2d 840 (1964), the differences were \$123,802/\$60,000 and \$549,587/\$250,000, or more than double in each case. In *C.C. Anderson Stores, Inc. v. State Tax Commission*, 86 Idaho 249, 384 P.2d 677 (1963), the difference between the assessor's valuation (\$400,000) and the taxpayer's valuation (\$286,000) was about 40%. In *re Farmer's Appeal*, 80 Idaho 72, 325 P.2d 278 (1958) involved a difference of \$11,446/\$7,507, and *Appeal of Sears, Roebuck and Co.*, 74 Idaho 39, 256 P.2d 526 (1953) a difference of \$178,350/\$115,180.

These cases indicate, then, that at least where the assessed valuation is nearly double that of the actual value, or more, the Court regards the overvaluation as excessive. It is not clear from the cases how much less would be regarded as not excessive, as the Court has not adopted a hard-and-fast rule to determine "excessive" overvaluation.

It is also possible, under the constitutional uniform taxation requirements of article 7, §§2 and 5, Idaho Constitution, and the Idaho Supreme Court cases decided thereunder, that an argument could be made that, where taxable *personal* property is assessed at actual market value but real property is assessed with the inflationary increase regardless of actual value, the uniform taxation requirement has been violated. *Idaho Telephone Co. v. Baird*, 91 Idaho 425,

423 P.2d 337 (1967); *Chastain's, Inc. v. State Tax Commission*, 72 Idaho 344, 241 P.2d 167 (1952); *Anderson's Red & White Store v. Kootenai County*, 70 Idaho 260 215 P.2d 815 (1950). Again, this would depend upon the particular factual situation under consideration.

2. The second issue is whether an individual county assessor has the authority to assess taxable property at actual market value even if this were to result in violating a directive from the State Tax Commission that all property, regardless of actual value, be assessed at 1978 market value plus a mandatory two percent per year increase for 1979 and 1980. (For purposes of this opinion, we shall assume, *arguendo*, that it in fact can be shown that some individual properties have in fact *decreased* in value since 1978.)

The constitutional requirement that taxable property be valued and assessed at fair market value is discussed above. We have also set forth the pertinent constitutional and statutory provisions defining the authority of the State Tax Commission in relation to the work of the county authorities. As noted, article 7, §12, Idaho Constitution, empowers the State Tax Commission to supervise and coordinate the work of the county boards of equalization, who, in turn, are required to operate under rules and regulations of the commission. *Idaho Code* §63-111 provides that "cash value" means "market value for assessment purposes," as defined by rules and regulations of the State Tax Commission." *Idaho Code* §63-202 makes it the duty of the commission to prepare and distribute rules and regulations prescribing and directing the manner in which market value for assessment purposes is to be determined for the purpose of taxation, and provides that the assessor of each county is required to abide by, adhere to, and conform with the commission's rules and regulations. *Idaho Code* §63-202A provides that every public officer shall comply with the commission's orders, rules, and regulations. *Idaho Code* §63-513 vests general supervisory powers over ad valorem taxation in the tax commission, and authorizes it to issue instructions and directions to the county assessors. Finally, *Idaho Code* §63-923(2) provides that market value for assessment purposes shall be determined by the county assessor according to the rules and regulations prescribed by the State Tax Commission, as provided in Section 63-202, *Idaho Code*.

In short, the constitutional and statutory scheme vests considerable regulatory power in the State Tax Commission and expressly requires the county assessors to adhere to and comply with those regulations and directives. The question, then, is whether an individual assessor could, (where the application of those rules and directives would, or might, as applied to a particular property, result in an unconstitutional valuation,) lawfully ignore or challenge an otherwise valid directive of the commission. (For purposes of this opinion, we assume that the directive in question is otherwise valid as a lawful instruction or direction to county assessors under *Idaho Code* §63-513(5).)

It is a general rule, recognized in Idaho and elsewhere, that a ministerial (non-policy making) officer cannot question the constitutionality of a statute or regulation fixing his ministerial duties or refuse to comply with its provisions. 16 Am. Jur. 2d, *Constitutional Law*, §199; *Jewett v. Williams*, 84 Idaho 93, 369 P.2d 590 (1962). We recognized this doctrine in Attorney General Opinion No. 79-16 (July 17, 1979), cited above, and said:

The reasoning behind this doctrine has been said to be that to allow a ministerial officer to decide upon the validity of a law would be sub-

versive of the object of government, for if one such officer may assume such power, other officers may do the same, resulting in destruction of civil government.

The rule that public officers cannot question the validity or constitutionality of a statute is not an inflexible one. It is subject to the qualification that in any case in which an officer might be held personally liable for his acts, he has such an interest as entitles him to question the constitutionality of the statute. 16 Am. Jur. 2d, *Constitutional Law* §199. The Idaho Supreme Court has recognized the rule that even a ministerial officer may raise the question of the constitutionality of a statute if the nature of his office is such that it is his duty to do so, or if his personal interest will be affected by the statute. *State v. Malcom*, 39 Idaho 185, 226 P. 1083 (1924).

It does not appear to us to be likely that an assessor would face risk of personal liability in carrying out the directives of the State Tax Commission. Generally, assessors are regarded as immune from personal liability for performance of their duties, with exceptions such as where the assessor acts in bad faith or with malice, or where he acts without jurisdiction. 82 A.L.R. 2d 1148.

However, the courts have also recognized a limited exception to the rule prohibiting public officers from challenging statutes, in the situation where a question of general and vital public interest may be involved. *Thompson v. South Carolina Comm. on Alcohol and Drug Abuse*, 267 S.C. 463, 229 S.E.2d 718(1976). In *State v. Malcom*, 39 Idaho 185, 226 P. 1083 (1924), where a county assessor was being sued on his bond for alleged nonperformance of a statutory duty, the Idaho Supreme Court said:

It seems to us unwise to lay down a hard-and-fast rule . . . If an election officer refuses to perform his duties on the eve of election, when all preparations have been made for the holding of the election and there is no time to adequately consider difficult questions of constitutional law, it would seem that the court should not permit him to raise the constitutional question in a *mandamus* proceeding, but should order him to perform the duty enjoined upon him by the statute and weigh the constitutional question at a later date in a more adequate proceeding. But if the law is obviously unconstitutional and its enforcement will result in greater hardship or expense to the public, it would seem that the court should hold that it is within the implied duty of the officer to raise the question of constitutionality . . . 39 Idaho at 190-191.

Certainly it is arguable that the question of the validity of the tax commission directive is of sufficient public importance to allow a county assessor standing to challenge it. However, the same was undoubtedly true of the issues involved in *Jewett v. Williams*, 84 Idaho 93, 369 P.2d 590 (1962), where our Supreme Court indicated its disapproval of allowing officers to challenge the statute there involved. We cannot predict with any certainty how the courts would treat the question of a county assessor's standing to challenge the directive in the issue before us; only an actual court case could determine the question. However, in light of the strong constitutional and statutory policy of this state to subject county assessors to the rules and regulations of the State Tax Commission, as well as the strong presumption in favor of the validity of the commission's regulations and the availability of both administrative and judi-

cial redress to individual taxpayers who may be aggrieved by the policies of the tax commission as they affect individual parcels of property, it is our opinion that individual county assessors would not have standing before the courts to challenge the validity of the directive, and that the assessors should comply with the directive unless and until it is judicially determined that the directive is invalid. As we said in Attorney General Opinion No. 79-16:

Considering the improbability of such [personal] liability on one hand, and the serious consequences to the administration of government that a refusal by public tax enforcement officers to obey the statute would have on the other, it is our firm opinion that those ministerial officers charged with enforcing these tax laws should comply with the provisions of [the statute] until the law is changed or a court of competent jurisdiction has determined that the statute is invalid.

The above analysis is directed to the question of the right of a county assessor to ignore or challenge the State Tax Commission's directive. Nothing herein is intended as applying to or denying the right of an individual taxpayer to challenge his individual assessment before the Board of Equalization, the Board of Tax Appeals, or the district court. Such a taxpayer would not be subject to the limitations upon the right of public officials to challenge a law or regulation, and, although the taxpayer would have to overcome the presumptions of validity and constitutionality and other possible defenses discussed under the first question above, it is entirely possible that, if the taxpayer could show that the value of property has in fact decreased since 1978, and that the commission's directive, as applied to his property, is arbitrary and erroneous, he would prevail.

AUTHORITIES CONSIDERED:

1. Idaho Constitution, article 7, §§2, 5, and 12.
2. *Idaho Code* §§63-111, 63-202, 63-202A, 63-306, 63-322, 63-513, and 63-923.
3. Idaho Cases:

Justus v. Board of Equalization of Kootenai County, 101 Idaho 743, 620 P.2d 777 (1980).

School Dist. No. 25 v. State Tax Commission, 101 Idaho 283, 612 P.2d 126 (1980).

Merris v. Ada County, 100 Idaho 59, 593 P.2d 394 (1979).

Title and Trust Co., Etc. v. Board of Equalization of Ada County, 94 Idaho 270, 486 P.2d 281 (1971).

Janss Corp. v. Board of Equalization of Blaine County, 93 Idaho 928, 478 P.2d 878 (1970).

Idaho Telephone Co. v. Baird, 91 Idaho 425, 423 P.2d 337 (1967).

C.C.Anderson Stores Co. v. State Tax Commission, 91 Idaho 413, 422 P.2d 337 (1967).

Abbott v. State Tax Commission, 88 Idaho 200, 398 P.2d 221 (1965).

Boise Community Hotel, Inc. v. Board of Equalization, 87 Idaho 152, 391 P.2d 840 (1964).

C.C.Anderson Stores Inc. v. State Tax Commission, 86 Idaho 249, 384 P.2d 677 (1963).

Jewett v. Williams, 84 Idaho 93, 369 P.2d 590 (1962).

In re Farmer's Appeal, 80 Idaho 72, 325 P.2d 278 (1958).

Appeal of Sears, Roebuck and Co., 74 Idaho 39, 256 P.2d 526 (1953).

Chastain's, Inc. v. State Tax Commission, 72 Idaho 344, 241 P.2d 167 (1952).

Anderson's Red & White Store v. Kootenai County, 70 Idaho 260, 215 P.2d 815 (1950).

State v. Malcom, 39 Idaho 185, 226 P. 1083 (1924).

Washington County v. First Nat. Bank of Weiser, 35 Idaho 438, 206 P. 1054 (1922).

Northern Pacific Ry. Co. v. Clearwater County, 26 Idaho 455, 144 P. 1 (1914).

Humbird Lumber Co. v. Thompson, 11 Idaho 614, 83 P. 941 (1905).

4. Other Cases:

Thompson v. South Carolina Commission on Alcohol and Drug Abuse, 267 S.C. 463, 229 S.E. 2d. 718 (1976).

Kittery Elec. Light Co. v. Assessors of Town of Kittery, 219 A. 2d. 728 (Maine 1966).

Fruit Growers Express Co. v. Brett, 22 P.2d 171 (Mont. 1933).

5. Other Authorities:

Attorney General Opinion No. 79-16 (July 17, 1979) (Idaho).

16 Am. Jur. 2d. *Constitutional Law* §199.

82 A.L.R. 2d. 1148.

DATED this 6th day of June, 1981.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

ROBIE G. RUSSELL
Deputy Attorney General
Chief, Local Government Division

MICHAEL C. MOORE
Special Assistant Attorney General

cc: Idaho State Library
Idaho Supreme Court
Idaho Supreme Court Law Library

ATTORNEY GENERAL OPINION NO. 81-13

TO: Director
State of Idaho Department of Health and Welfare
Statehouse Mail

Per Request for Attorney General Opinion

QUESTIONS PRESENTED:

The Director of the Idaho Department of Health and Welfare, on behalf of the Division of Environment, requests an opinion on the Department's legal authority to retain field offices and field office administrators, and its legal responsibility to implement, administer and enforce various statutory programs in light of substantial budget reductions imposed by the 1981 regular session of the Idaho State Legislature. The Director has asked the following four questions:

1. Is the Department required by law to follow the Joint Finance-Appropriations Committee's (JFAC) informal recommendations relating to the curtailment or elimination of specific bureaus, programs and positions, absent a clear indication of legislative intent appearing on the face of the appropriations act or some other sufficient action taken by the legislative body as a whole?
2. Would legislative adoption of a JFAC appropriations bill, which may have been based on the deletion of funding for certain programs, suffice to suspend or repeal the Department's statutory responsibility to implement, administer and enforce state statutes and regulations relating to the programs?
3. If the reduction or elimination of funding for a program does not repeal or suspend the Department's statutory responsibility, could citizens of this state compel enforcement of the law by a legal action against the state or by suing the administrators directly?
4. If the reduction or elimination of funding for a program does not repeal or suspend the Department's statutory responsibilities, could the State of Idaho or its employees be held liable for damages sustained by private parties as a result of the non-enforcement of a state law related to the program?

CONCLUSIONS:

1. On the basis of the evidence presently available, the Department of Health and Welfare may not provide funds for the operation of the Division of Environment's various air quality programs. The Department probably has authority, however, to continue the remainder of the Division of Environment's programs, positions and offices in whatever manner the Director of Health and Welfare, in his sound discretion, judges to be most effective to carry out the Division's statutory responsibilities.

2. The appropriations act for the Division probably did not amend, suspend or repeal any substantive laws. Under the traditional rules of statutory construction, there is sufficient evidence presently available to conclude that the legislature intended to suspend the Division's statutory responsibilities under all of the state's air quality laws. A court might be reluctant to construe the appropriations act in this matter, however, because such an interpretation could place the measure in violation of article 3, §§16 and 18 of the Idaho Constitution.

3. Citizens cannot resort to the courts to force the Board of Health and Welfare or the Director of the Department of Health and Welfare to enforce air pollution laws and regulations. The courts will not interfere with any reasonable exercise of discretion by an agency or its administrators. Where the legislature has refused to appropriate funds for a program, an agency can reasonably decide to terminate or suspend that program and enforcement related to it. The reasonableness of the agency's decision would be supported by the fact that continued operations were impossible due to lack of funds. Financial impossibility, furthermore, is a defense to citizen suits against agencies.

4. The Idaho Supreme Court has recently interpreted the Idaho Tort Claims Act as not authorizing tort actions against the state or its employees for failing to enact or enforce regulations and standards.

STATEMENT OF FACTS:

In his proposed budget for the 1981-1982 fiscal year, the Governor requested an appropriation of \$987,000 for the Division of Environment's Bureau of Water Quality, and \$591,300 for the Bureau of Air Quality and Hazardous Materials.¹ The Governor's proposed budget, once adjusted for inflation, corresponds very closely to the Division's actual appropriation for the 1980-1981 fiscal year.² In its 1981 regular session, however, the Idaho Legislature passed Senate Bill 1208, which "appropriated to the Department of Health and Welfare, Division of Environment, for the Water Quality and Hazardous Materials Program the following amounts . . . for the period July 1, 1981, through

¹The Air Quality and Hazardous Materials Bureau administers all the Division's non-water related programs, including air quality planning and engineering, air quality surveillance and analysis, solid waste, hazardous waste, radiation control, and vector control (programs related to non-human disease-carrying animals).

²The 1980 legislature provided \$878,400 for water quality programs and \$536,000 for air quality and hazardous materials programs. 1980 Idaho Sess. Laws, ch. 307 at 790; ch. 347 at 881; ch. 366 at 947.

June 30, 1982 . . . \$983,000”³ The funding measure fails to mention any of the air quality programs, and it apparently creates, at least for fiscal purposes, a new “Water Quality and Hazardous Materials Program.”

Senate Bill 1208 was prepared and introduced by the legislature’s Joint Finance-Appropriations Committee (JFAC) pursuant to *Idaho Code* §67-3514. JFAC used the Governor’s figures as a benchmark and then entertained a number of motions to decrease the amount. *See* Joint Finance-Appropriations Committee, *Rules of Procedures*, Rule 5 (Dec. 1980). A motion to provide \$537,800 for the Air Quality and Hazardous Materials Bureau failed on a 10-10 vote. A subsequent motion which eliminated funding for the Bureau passed. Some committee members favoring this motion expressed the “intent that the Solid Wastes Program, Hazardous Materials Program, and the Vector Control Program would become programs of the Water Quality Agency.”⁴ Next, a successful motion was made to provide \$983,000 in general funds for the Water Quality Bureau. An informal “Program Request by Decision Unit” worksheet based on the successful motion was then prepared and was given to a legislative analyst who actually drafted Senate Bill 1208.⁵

The exact reasoning used by JFAC to set the level of funding in Senate Bill 1208 is not clear. The Program Request worksheet indicates that the Governor’s budget for the Water Quality Bureau was cut from \$987,000 to \$733,000. Handwritten comments on the worksheet and statements made during the committee’s deliberations indicate that part of the reduced budget figure was based on the elimination of the Division’s Field Services Bureau Chief, regional supervisors, and field office support staff, and part was based on the elimination of two of the Bureau’s four water quality programs. The worksheet indicates that \$249,700 was then added to the water quality budget to fund “Solid and Hazardous Waste, Vector Control and Radiation Control” programs.

It is difficult to determine what the committee intended when it prepared the Division’s budget based on the elimination of certain programs and positions. Statements made by individual JFAC members during the discussion of the motion could be interpreted as advocating the total elimination of programs, the temporary suspension of programs, or merely one possible option that would allow the Division to operate within its reduced budget. The latter interpretation may be supported by the fact that JFAC’s statutory powers and duties are limited largely to budget and finance matters. *Idaho Code* §67-435. JFAC’s own rules provide that special procedures must be followed if an appropriations bill is intended to have substantive effect. Joint Finance-Appropriations Committee, *Rules of Procedures*, Rule 8 (Dec. 1980).

Apparently, the legislature as a whole was presented only with Senate Bill 1208 in its final form. *Idaho Code* §67-435(6) requires JFAC to “submit a report to each session of the legislature . . . setting forth its findings and recommendations.” JFAC, however, did not prepare a formal report. During the

³See appendix A for the complete text of Senate Bill 1208.

⁴JFAC Committee meetings are taped, but they are not transcribed. A written record is kept of all motions, however.

⁵See appendix B.

introduction and debate of the bill on the House and Senate floors, the legislature may have become aware of JFAC's recommendations relating to elimination of the air quality programs, field offices, and the reorganization of the Water Quality Bureau to include hazardous and solid waste, radiation control and vector control.⁶ Unfortunately, neither the sponsors' statements nor the debate were entered into journals or otherwise officially recorded.

The legislature did take other actions, however, which provide some evidence of a collective intent. On March 23, the House defeated a motion that would have placed Senate Bill 1208 up for amendment in order to fund the Air Quality Bureau with \$200,000 pulled from another department. The motion failed, however, and the original bill passed. *See House Journal* at 339, 46th Leg., 1st Reg. Sess. 1981. In addition, the House of Representatives later passed House Bill 452, which would have provided \$100,000 for the air quality programs. *See House Journal* at 344, 46th Leg., 1st Reg. Sess. 1981. This measure did *not* originate with JFAC. The measure went from the House to the Senate Finance and Appropriations Committee. The Senate Committee, however, failed to consider the bill or to send it to the floor for debate.

In other related matters, on March 16th, 1981, the Senate Health, Education and Welfare Committee formally approved the Division's air pollution control regulations. (This was the same day that the Senate as a whole passed Senate Bill 1208). On March 24, 1981, the Senate and House Health, Education and Welfare Committees unanimously approved a letter addressed to the Speaker of the House and President of the Senate, which states that it was not the legislature's intent to limit in any way the Department's use of regional or field offices and administrators.⁷ This letter was subsequently read into the *Journal* on a majority vote. *Senate Journal* at 256-57, 46th Leg., 1st Reg. Sess. 1981.

ANALYSIS:

QUESTION #1: Implied limitations on the use of the funds appropriated for the Division of Environment.

STATUTORY CONSTRUCTION PRINCIPLES:

It is a longstanding principle of our system of government that the legislature must authorize all appropriations and that it may therefore control all agency spending. *See Idaho Constitution* article 7, §13; *Idaho Code* §67-3516; *see, e.g., Herrick v. Gallet*, 35 Idaho 13, 204 P. 477 (1922); *Epperson v. Howell*, 28 Idaho 338, 343-44, 154 P. 621 (1916). As a consequence, if the legislature specifically fails to make an appropriation for a program, then an agency may not circumvent the legislature's inaction by merely transferring money from another source to the program in question. *See State v. Adams*, 90 Idaho 195, 203-04, 409 P.2d 415 (1965). However, when an appropriations act provides only for a reduced lump-sum amount that is to be used for "the Water Quality and Hazardous Materials Program," the parameters of the legislature's financial mandate and the Director's administrative authority are unclear. In order

⁶Both houses were aware at least of the recommendation to eliminate all of the air quality programs. *See, e.g., The Idaho Statesman*, March 17, 1981, at 8A.

⁷*See* appendix C.

to answer the question posed, it is necessary to determine (1) whether the agency legally may continue any programs relating to air quality; (2) whether the agency must eliminate field office personnel; (3) whether \$249,700 must be allocated for hazardous materials programs (and whether solid waste, vector control and radiation control programs are included in the term "Hazardous Materials"; and (4) whether \$733,300 must be allocated to water quality programs (and whether all traditional water programs may be funded).

1. Intrinsic Aids to Construction

A statute may be ambiguous because of the language used or because it is silent regarding logically related matters. When faced with a statute that is literally clear but pregnant with uncertain implications, the Idaho Supreme Court has subscribed to the traditional maxim that "the expression of one thing is the exclusion of all others."⁸ *E.g., Local 1494 of the International Association of Firefighters v. City of Coeur d'Alene*, 99 Idaho 630, 639-40, 586 P.2d 1346 (1978) (hereinafter cited as *Firefighters*).

This rule, as applied to the present facts, creates what might be called a presumption that the legislature's only intention was that the Division be given \$983,000 for expenditure on the Water Quality and Hazardous Materials Program.⁹

2. Extrinsic Aids to Construction

Historically, Idaho has adhered to the rule that it is improper for a court to resort to extrinsic aids¹⁰ to construction when the statutory language itself is not ambiguous. *See, e.g., United States v. Lexington Mill & Elevator Co.*, 232 U.S. 399, 409 (1914); *Knight v. Employment Security Agency*, 88 Idaho 262, 264, 398 P.2d 643 (1965) (and authorities cited therein); *see generally* 2A C. Sands, *Sutherland Statutory Construction* §48.01 (4th ed. 1972). When a legislative pronouncement is ambiguous, Idaho courts have considered themselves bound to consider the statute's "context, the object in view, the evils to be remedied, the history of the times and of legislation upon the same subject, public policy, contemporary construction, and the like." *In re Gem State Academy Bakery*, 70 Idaho 531, 541, 224 P.2d 529, 535 (1950); *See Firefighters*, 99 Idaho at 639.

Recently, the Idaho Supreme Court has stepped back somewhat from this traditional position of refusing to consider extrinsic aids when a statute is literally unambiguous. In the *Firefighters* case, a majority of the court held that extrinsic evidence could be used to confirm the literal meaning of a statute

⁸This maxim is an intrinsic aid to construction. Intrinsic aids are rules based only on the text of an act. *See* 2A C. Sands, *Sutherland Statutory Construction* §47.01 (4th ed. 1972).

⁹The statute's provision of funding for "the Water Quality and Hazardous Materials Program" creates an additional interpretation problem. Use of the definite article "the" suggests that money was appropriated only for use in an existing program. There is presently no such program. It is logical to assume that the legislature intended to finance the existing programs in the Water Quality Bureau and the non-air related programs in the Air Quality and Hazardous Materials Bureau. This interpretation is supported by taped oral statements made during the JFAC proceedings.

¹⁰"Extrinsic Aid" in this context refers to the use of any evidence of legislative intent found outside of the actual text of a legislative measure. *See* 2A C. Sands, *Sutherland Statutory Construction* §48.10 (4th ed. 1972).

when the ambiguity was solely the result of statutory silence. *Firefighters*, 99 Idaho at 639. In that case the statute in question stated that firefighters could not strike during the term of their contract, but it was silent as to their right to strike after a contract had expired. Dicta in the case suggest that extrinsic evidence may be properly considered under almost any circumstances. *Id.* at 641 (quoting *Data Access Systems, Inc. v. State Bureau of Securities*, 63 N.J. 158, 305 A.2d 427, 432 (1973)).¹¹

a. JFAC's Expression of Intent

JFAC and its members were responsible for various expressions of intent and purpose which did not appear on the face of Senate Bill 1208. These manifestations can be found in committee discussions, committee motions, comments on the informal "Program Request" worksheet, interviews given by committee members, and statements made by committee members on the House and Senate floors. Traditionally, finance committee statements of intent are held to have no independent relevance on the question of legislative intent, absent some indication of legislative adoption. *See, e.g., Tennessee Valley Authority v. Hill*, 437 U.S. 153, 191-94 (1978); *New York Public Interest Research Group, Inc. v. Carey*, 55 App. Div. 2d 274, 236 N.Y.S. 2d 390 (1976), *appeal dismissed*, 41 N.Y. 2d 1072, 364 N.E. 2d 84, 396 N.Y.S. 2d 155 (1977); *see also Securities and Exchange Commission v. Sloan*, 436 U.S. 103, 120-21 (1978). This principle is apparently based on the notion that any other rule would allow a few delegates from the controlling party to shape significantly, and even to create, law solely within the committee apparatus. Such a situation would be unacceptable under conventional theories of delegation of powers, separation of powers and the rights of citizens to be apprised of the law and the lawmaking process.

A committee's official recommendations, interpretations of an act, and its expressions of intent are germane on the issue of legislative intent, however, to the extent that the legislature as a whole was aware of the committee's view. *See generally* 2A C. Sands, *Sutherland Statutory Construction* §48.06, 48.14 (4th ed. 1972). In fact, accurately published committee reports setting out the effect of a statute and the basis for the committee's recommendation are considered to be highly persuasive, although not decisive by most courts. But this rule applies only when the legislature has consistently adhered to the committee's views. *See id.* at §48.06 (and authorities cited therein).

It is possible, although not likely, that the Idaho Supreme Court will not follow the general principles set out above. Dicta in the recent *Firefighters* case state that it may be proper for a court "to consider materials which have never met the legislative eye", but such "materials must be carefully scrutinized and their weight and authenticity evaluated." *Firefighters*, 99 Idaho at 641 (citing *Data Access Systems, Inc. v. State Bureau of Securities*, 63 N.J. 158, 305 A.2d 427, 432 (1973)). *But see Firefighters, supra*, 99 Idaho 646 (Shepard, J., dissenting). The theoretical basis and the scope of the *Firefighter* court's pronouncement are unclear.

¹¹The *Firefighters* opinion fails to establish whether such evidence also may be freely used to supplement or refute the literal meaning of a statute or legislative intent apparent from the face of an act. The decision was written by Justice Bistline for a sharply divided court. Justice Shepard wrote a strong dissent challenging the majority's conclusion on this issue and the majority's reliance on, and interpretation of, the *Data Access Systems* case.

If the conventional rules of construction apply, JFAC's collective interpretation of Senate Bill 1208 is relevant to the issue of legislative intent only to the extent that the interpretation was presented on the House and Senate floors. Otherwise, it cannot be assumed that the legislature as a whole was aware of these views because a formal report was not prepared or circulated. It is difficult to determine, however, exactly what occurred in the legislative chambers because neither the committee's statements nor the debate are recorded in the House or Senate Journals. As a consequence, the only evidence available of what occurred during these proceedings are sketchy press reports and the recollections of individual legislators and observers.

A split of authority exists regarding whether unofficial and unverifiable recollections of legislative proceedings can be used as extrinsic evidence of legislative intent. In the *Firefighters* case, a majority of the Idaho Supreme Court held that an interested lobbyist's uncorroborated testimony relating to a sponsor's statements and the earlier failure of a similar bill were "entitled to serious consideration." *Firefighters*, 99 Idaho at 640-41. The testimony in *Firefighters* was given in an earlier informal hearing and it was largely a hearsay account. The Court was impressed, however, by the fact that the lobbyist's statements were uncontroverted. Shepard, J., dissented, decrying the use of such evidence on the grounds that it failed to reach a threshold of reliability necessary for legal relevance and because the rule itself would lead in the future to "the ridiculous spectacle of two persons arguing about the intent of the legislature" with their arguments based only on "hearsay, conclusions and speculation." *Id.* at 645-46.

b. Statements Made by JFAC Members

Press interviews and other similar statements made by individual committee members, without the authorization or subsequent ratification by the committee as a whole, are entitled to little or no weight. With this type of expression there is no factual indication or logical probability that the law-making body ever considered, much less adopted, the committee member's personal views. *See generally* 2A C. Sands, *Sutherland Statutory Construction* §48.16 (4th ed. 1972).

c. Sponsor's Statements

JFAC appointed Senator Dean Van Engelen and Representative Mack Neibaur as sponsors for Senate Bill 1208. Traditionally, statements made by sponsors on the floor are accorded substantial consideration by courts attempting to construe a statute.¹³ 2A C. Sands, *Sutherland Statutory Construction* §§48.14 - 48.16 (4th ed. 1972). Since no official record of the sponsors' statements exists, only press reports and testimonial recollections are available. News media accounts indicate that Senator Van Engelen told his respective assembly that the Division's air quality programs were being eliminated by the bill because these activities were duplicative of federal efforts. *See, e.g., The Idaho Statesman*, March 17, 1981, at 8A. Very little evidence is otherwise available, absent an opportunity to interview these sponsors and record their recollections of what they said on the floor.

¹³Such statements are generally given the same weight as a formal committee report unless there is some indication that the sponsor is performing that function at the bequest of some private interest or is actively seeking partisan support for the measure. *See* 2A C. Sands, *Sutherland Statutory Construction* §48.16 (4th ed. 1972).

d. Legislative Debates

Traditionally, statements made during legislative debates by individual legislators (other than sponsors and committee members in charge of a bill) are not acceptable construction aids. Such extrinsic evidence is usually deemed to be unreliable because: (1) it is not clear what weight, if any, was given to the statements by other legislators; (2) the speaker's purpose or motive for making the statements cannot be known; (3) often such statements are unduly biased; and, (4) statements in oral debate are often imprecise. *See generally*, 2A C. Sands, *Sutherland Statutory Construction* § 48.13 (4th ed. 1972).

Modern cases exhibit an increased tendency to consider legislative debates. The courts have been very cautious, however, to rely only on debates which were well publicized and attended, and on debators who appeared to be unusually well informed on the subject. Moreover, statements made in debates have generally been used only to establish the evils which the legislation sought to remedy or to establish agreement between proponents and opponents on interpretation of a proposed measure. *See, e.g., Hodgson v. Board of County Commissioners of the County of Hennepin*, 614 F.2d 601, 614-15 (8th Cir. 1980); *see generally* 2A C. Sands, *Sutherland Statutory Construction* § 48.13 (4th ed. 1972). *But see Planned Parenthood Affiliates of Ohio v. Rhodes*, 477 F. Supp. 529, 639 (S.D. Ohio 1979). There are apparently no Idaho cases on this precise issue and, at present, there is very little evidence of what statements were actually made during debate.

e. Related Legislative Action

Prior and concurrent legislative attempts to modify the act in question are almost universally accorded great weight in the construction process. Such actions often demonstrate legislative consensus on an issue, and official verification is readily available. *See, e.g., Firefighters, supra*, 99 Idaho at 640-41; *see generally* 2A C. Sands, *Sutherland Statutory Construction* § 48.18 (4th ed. 1972).

In the present situation, unsuccessful attempts to fund the Division's air quality programs are substantial evidence of a legislative intent that no money be spent on air programs. In a similar manner, the letter approving regional or field offices, which was approved by the House and Senate Health, Education and Welfare Committees and which was adopted by the Senate as a whole, would seem to rebut any argument that Senate Bill 1208 implicitly abolished the Division's field office administrators. Such a letter is not a legislative act per se, but it may be likened to a simple resolution. As such, approval by even one house is sufficient to negate any implied intent to the contrary.

f. Subsequent Statements of Legislators or Others Regarding Legislative Intent

Most jurisdictions refuse to consider the subsequent statements of individual legislators and other observers relating their understanding of the legislature's intent in enacting a bill because such evidence has only questionable reliability and because courts wish to avoid passing upon the credibility of legislator-witnesses. *See* 2A C. Sands, *Sutherland Statutory Construction* § 48.16 (4th ed. 1972) (and authorities cited therein). However, statements made by the Idaho Supreme Court in the *Firefighters* decision might be construed to sanction evaluation of such opinions. *See Firefighters*, 99 Idaho at 640-41.

3. Conclusion

Absent a valid legislative enactment to the contrary, the Director of the Department of Health and Welfare has the authority, within his sound discretion, to use the money appropriated to the Division in whatever manner is best calculated to fulfill his statutory responsibilities. The only express limitation in the text of the appropriations act itself is that the money allocated to the Division must be used for "the Water Quality and Hazardous Materials Program." Thus, under the conventional rules of statutory construction, a strong presumption is created that no additional conditions exist.

There is of course some confusion as to what the legislature meant by the use of the phrase "the Water Quality and Hazardous Materials Program." Substantial evidence exists that the legislature intended that no part of the money authorized be spent on any programs related to air quality. This is the common-sense interpretation of the language used, and it is also supported by the fact that the Division traditionally has organized its various programs into an Air Quality and Hazardous Waste Bureau and a Water Quality Bureau. Additional evidence supporting this construction can be found in statements made by the bill's sponsor on the Senate floor and in efforts in the House to amend the bill and to pass an additional measure in order to fund the air quality programs.

The term "Hazardous Materials," as used in the act, was probably intended to include the solid waste, radiation control, and vector control programs. Such an interpretation is not necessarily bolstered by the literal language of the act, but it is supported by an analysis of the traditional organization of the Division. It is clear that several of the JFAC members intended that term to include all of these traditional programs, but, unfortunately, there is no evidence presently available which indicates that the legislature as a body was aware of this intent. JFAC's intentions per se probably are not binding as a matter of law. Moreover, it is almost impossible to distinguish between the intention of the committee and the intentions of a few of its more vocal members, since JFAC did not prepare a formal report or follow its own rules with regard to the preparation of bills with substantive legal effect.

The legislature probably did not limit the use of the funds to just two of the existing water quality programs. It is clear that some committee members favored such a limitation, but none of the evidence presently available suggests that the legislature was ever made aware of, much less adopted, such a restriction. There is also substantial evidence that some JFAC members intended that no money be allocated to pay for the salaries of certain field office personnel. Once again, however, there is no evidence that the legislature as a whole considered or accepted this proposition. In fact, the committees in both houses with jurisdiction over the substantive operation of the Division of Environment seem to have rejected such an interpretation of the bill. This stance was apparently adopted by the Senate as a whole.

B. CONSTITUTIONAL PRINCIPLES

Certain constitutional arguments also can be raised against implied limitations in appropriations acts if those limitations have the effect of modifying existing substantive laws. These constitutional issues are discussed in the analysis of Question 2 below. *See* page 23, *infra*.

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QUESTION #2: Repeal, suspension, or amendment of substantive laws implied from the appropriations act.

A. STATUTORY CONSTRUCTION PRINCIPLES

The question in brief is whether the legislature's failure to provide the Division of Environment with sufficient funds to implement, administer, and enforce its statutorily mandated programs constitutes an implied repeal, suspension or amendment of the agency's legal responsibilities. The Division has a substantial number of vaguely defined statutory duties.¹⁴ The applicable budgetary facts are set out in detail in the Statement of Facts above. In sum, the legislature provided no funds for the Division of Environment's air quality programs and the appropriation for the remainder of the Division's programs was reduced to a point where it may not be possible to discharge all of the agency's statutory responsibilities.

1. Implied Repeal in General

As a general rule, repeals by implication are disfavored. A subsequent statute will not repeal an earlier enactment by implication unless the two statutes are both inconsistent and irreconcilable. *See, e.g., State v. Rawson*, 100 Idaho 308, 312 597 P.2d 31 (1979); *State v. Roderick*, 85 Idaho 80, 83, 375 P.2d 1005 (1962) (and authorities cited therein); *see generally* 1A C. Sands, *Sutherland Statutory Construction* §§23.09 - 23.10 (4th ed. 1972). Thus an earlier statute "will not be deprived of its potency if a reasonable alternative construction is possible." *State v. Rawson*, 100 Idaho 308, 312, 597 P.2d 31 (1979). A closely related principle is that if a general and a specific statute exist, both "dealing with the same subject, the provisions of the special or specific statute will control those of the general statute." *State v. Roderick*, 85 Idaho 80, 83, 375 P.2d 1005 (1962) (and authorities cited therein).

These rules of construction are based upon two sometimes conflicting presumptions about the nature of the legislative process. First, the legislature is presumed to intend to create a consistent body of law; and second, the legislature is presumed to consider the whole body of law when it enacts a new measure and therefore to expressly repeal a former law if that is its intention. This latter presumption is strengthened by the notion that if the "Court were readily to allow such inexplicit repeals of legislative enactments, the interpretation of our statutes, and the public's reliance thereon, would be thrown into confusion and uncertainty." *County of Ada v. Idaho*, 93 Idaho 830, 831, 475 P.2d 367 (1970); *see generally*, 1A C. Sands, *Sutherland Statutory Construction* §23.09 - 23.10 (4th ed. 1972).

As applied to the present controversy, these general rules seem to create what might be termed a rebuttable presumption against implied modification of a specific substantive statute by a subsequent appropriations bill of a general nature. These principles also establish that the appropriations bill has no effect on existing statutes to the extent that they create, define, or provide a standard for a private cause of action.

¹⁴Most of the Division's specific duties are set out in the analysis to Question 3 below. *See* page 25, *supra*.

2. Repeal of a Substantive Statute Implied from an Appropriations Act

Absent constitutional limitations discussed below, the legislature may use an appropriations act as a vehicle to modify an existing substantive statute if the legislature adequately expresses its intent. *See, e.g., United States v. Dickerson*, 310 U.S. 554 (1940); *Lewis v. United States*, 224 U.S. 135 (1917); *Director of the Civil Defense Agency and Office of Emergency Preparedness v. Legor*, 404 N.E.2d 679, 681 (Mass. App. 1980) (and authorities cited therein). It is difficult to determine, however, whether the failure to appropriate funds in an otherwise silent appropriations act may be construed as an implied expression of intent to repeal an agency's statutory responsibilities. No Idaho cases have been discovered which address this issue.

The United States Supreme Court, however, has recently addressed this precise question. In *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978) (hereinafter cited as *TVA*), the Court was faced with the question of whether congressional appropriations acts for the TVA's Tellico Dam, passed after it was apparent that the dam might lead to the extinction of the snail darter fish, were sufficient to exempt implicitly the project from the provisions of the Endangered Species Act. The Court concluded that repeals by implication are disfavored and that this:

policy applies with even *greater* force when the claimed repeal rests solely on an Appropriations Act. We recognize that both substantive enactments and appropriations measures are "Acts of Congress," but the latter have the limited and specific purpose of providing funds for authorized programs.

Id. at 190 (emphasis in the original). *But see, Friends of the Earth v. Armstrong*, 485 F.2d 1 (10th Cir. 1973), *cert. denied*, 414 U.S. 1171 (1974) (opposite result was reached in a very similar controversy involving Rainbow Bridge National Monument).

The Supreme Court rejected the notion that the intent to make an exception for the dam could be found in the reports of the appropriations committee and statements by individual members of Congress. The Court declared that "expressions of committees dealing with requests cannot be equated with statutes enacted by Congress." *TVA, supra*, 437 U.S. at 191. The Court noted that appropriations committees have no jurisdiction over substantive matters, such committees do not conduct hearings, and there was no clear indication that each member of Congress was aware of the committee's position.¹⁵ Personal views of individual legislators, the Court stated, "however explicit . . . cannot serve to change the legislative intent of Congress expressed before the act's passage." *TVA, supra*, 437 U.S. at 193 (quoting *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974)).

The Supreme Court's pronounced dissatisfaction with any attempt to find an implied repeal couched in a general funding measure appears to be based on the rationale that:

¹⁵As noted in the Statement of Facts above, JFAC also lacks statutory jurisdiction over substantive matters and may have failed to follow its own procedures relating to bills which are intended to have substantive effect.

[a]ppropriations bills must be passed continuously, and it would be an onerous burden for the members of Congress to have to scour such otherwise perfunctory measures for subtle repeals . . . In addition, such silent amendments are disfavored due to the coercive nature of appropriations bills with regard to passage.

Planned Parenthood Affiliates of Ohio v. Rhodes, 477 F. Supp. 529 (S.D. Ohio, 1979) (explaining *TVA v. Hill*); see *Committee for Nuclear Responsibility v. Seaborg*, 149 U.S. App. D.C. 380, 382, 463 F.2d 783, 785 (1971); *Environmental Defense Fund v. Froehle*, 473 F.2d 346, 355 (8th Cir. 1972).

Several circuit courts of appeal have concluded that *TVA v. Hill* does not hold that an appropriations act can never have an implied substantive effect. Rather, the decision has been construed to require the courts only to carefully analyze an appropriations act's legislative history and not to rely on isolated statements made in a committee report or on a chamber floor. See, e.g., *Sierra Club v. Andrus*, 610 F.2d 581, 609 (9th Cir. 1980). In one such case, *Hodgson v. Board of County Commissioners of County of Hennepin*, 614 F.2d 601, 614 (1980), the court held that the Hyde Amendment did impliedly repeal certain related provisions of the Medicaid Act. Ignoring a strong dissent, the majority distinguished *TVA v. Hill*, stating that: (1) the legislature as a whole may have been unaware of the implications of the appropriations act; (2) the substantive act in question was entirely separate in nature from the funding act; (3) there were indications that the appropriations bill was voted on in derogation of special congressional rules relating to provisions in an appropriations act which change the existing law.

All of the principles enunciated by the United States Supreme Court in *TVA v. Hill* seem to apply directly to the present facts and to militate strongly against finding an implicit repeal, amendment or suspension of any of the Division's statutory duties. Such a result could be avoided by adopting one of the qualifications to the *TVA v. Hill* doctrine formulated by the circuit court in the *Hodgson* case. Based on the evidence available, however, it is not clear that *TVA v. Hill* can be so easily distinguished in this instance.

3. Suspension of a Statute Implied from an Appropriations Act

Statutory suspension is the temporary deactivization of a valid legislative enactment by the passage of a later statute on the same subject. A suspended statute is automatically revived when the suspending act expires. The general rules applicable to implied repeals also apply to implied statutory suspensions. See generally, C. Sands, *Sutherland Statutory Construction* §32.30 (4th ed. 1972). Substantive riders to appropriations acts, whether implied or expressed, are more likely to suspend than to repeal previous legislative acts.

Without express limitations as to time, substantive acts are presumed to operate indefinitely. Appropriations acts generally are limited on their own terms to particular fiscal years. Because of the difference in their intended period of effectiveness, an inconsistency would at most operate to suspend the prior substantive act for the duration of the effective life of the appropriations act. Actual "repeal" could only be predicted upon a "positive repugnancy", one dimension of which would necessarily be a legislative intent that the "repealing" act be effective for a period of at least as long as that of the "repealed" act.

Note, *Legislative Bargains and the Doctrine of Repeal by Implication*, 46 Univ. Colo. L. Rev. 289, 292 (1974) (footnotes omitted).

Cases involving suspension of a substantive statute based merely on the legislature's failure to appropriate funds are not common. A few cases, however, do exist. See e.g., *City of Camden v. Byrne*, 82 N.J. 133, 411 A.2d 462 (1979); *Ex Parte Williamson*, 116 Wash. 560, 200 P. 329 (1921). In the *City of Camden* case, certain municipalities and counties brought suit to have revenues appropriated for their use as required by certain local government finance statutes. The New Jersey court stated *inter alia*:

Hence, at most, its effect upon inconsistent enactments could endure only for as long as itself endures. It is therefore more accurate to discuss such an effect in terms of *implied suspension* rather than implied repeal.

Id. at 472 (emphasis in original). The court went on to hold that the legislature intentionally failed to appropriate the necessary funds in some instances and failed to override the governor's veto in others. The court concluded that the earlier substantive statutes had thus been suspended. *Id.* at 473.

The analysis above suggests that if the enactment of the appropriations bill for the Division of Environment had any implied effect on prior substantive statutes, then it served only to suspend and not to repeal these laws. The appropriations act is limited in operation to a period of one year. It is repugnant to existing substantive acts only to the extent that it fails to provide sufficient funding for the operation of some statutorily mandated programs. Finally, there is no substantial evidence that the restraints placed on these programs were intended to be in effect permanently.

4. Conclusions

A statute is generally construed to mean what it expressly states and no more. Implied statutory provisions are particularly disfavored when they have the effect of repealing, suspending or amending existing legislative enactments. Such an implied modification will be found only when the later enactment is patently irreconcilable with existing law. This presumption against implied legislation is even stronger when an appropriations act is claimed to be the basis of an implicit amendment.

In some instances implied modification will be found, but only when there is a very clear indication that the legislature as a whole was aware of, and adopted, the implied provisions. There are no uniform rules defining exactly what evidence a court will consider when it seeks to discover this implied legislative intent. Apparently, in Idaho any evidence or testimony which is probative or relevant may be examined. Reliability is merely one of the factors to be weighed.

There is some evidence that certain individual members of JFAC believed that the bill would have the effect of repealing or modifying the existing statutes which empowered the Division to operate any air quality programs, to operate certain water quality programs, and to administer or operate field offices. Such individual interpretations and desires, however, do not constitute law. These personal views may be relevant only in the event that they repre-

sent the intent of a majority of the committee. Unfortunately, there is no way to determine what the committee's intent was, because JFAC did not prepare a report as required by statute. Moreover, it may be logical to assume that the committee intended any statements made about the elimination of programs or positions to be merely advisory, because JFAC ordinarily has no jurisdiction over substantive matters and because it did not even follow its own rules with regard to bills which are intended to effect substantive statutory modifications.

Even if a specific committee interpretation can be discovered, it is relevant only to the extent that it was considered and adopted by the legislature. Since legislative debates are not recorded in Idaho, it is difficult to determine what explanation of the bill was given to the legislature by the JFAC sponsors. Press reports indicate at least that sponsors advised the legislature that the bill had the effect of eliminating funding for all air quality programs.

There is presently no evidence available of what was said in the course of legislative debates. Such evidence, however, is usually held to be irrelevant or at least given very little weight. Other legislative actions taken by the body as a whole, however, are accorded substantial consideration. In this regard, the unsuccessful attempts to fund operation of the air quality programs by amending the Division's appropriations bill and by introducing a special bill may indicate that the legislature was aware that the appropriations act was inconsistent with laws authorizing the air quality programs.

There is also evidence that the germane substantive committees interpreted the appropriations act as having no implied effect on the Director's power to establish field offices and field office administrators. Apparently, one house adopted this view instead of the view held by the JFAC members in question. Logically, these acts weigh heavily against any finding of implied intent to modify the existing field office administration statutes.

There is no evidence that the legislature considered and adopted the views of some JFAC members regarding elimination of certain water quality programs. A reduced lump sum appropriation cannot be viewed as being irreconcilable with the operation of any specific program. This is especially true in the present situation, because the aggregation of the water programs and hazardous materials programs made it appear that the Water Quality Bureau's budget had not been reduced.

B. CONSTITUTIONAL ISSUES

1. Introduction

The Idaho Constitution includes two sections which can be construed to preclude implied repeal or suspension of any substantive statutes under the present circumstances and which may even invalidate some conditions that impliedly may have been placed on the funds appropriated. Idaho Constitution article 3, §16 states:

Unity of subject and title. Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title; but if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be embraced in the title.

A related provision in Idaho Constitution article 3, §18 states:

Amendments to be published in full. No act shall be revised or amended by mere reference to its title, but the section as amended shall be set forth and published at full length.

Upon examination, there are three separate constitutional requirements expressed in Sections 16 and 18. Although the courts sometimes fail to differentiate between the provisions, each requirement exacts a distinct type of legislative performance and each provides a particular type of protection for the legislative process. For this reason each provision is discussed separately below.

Despite their differences, however, the three requirements do share certain characteristics and objectives. Each provision places a strict limitation on the manner in which proposed legislation must be drafted and presented to the legislature and public for consideration and review. The common goal of each requirement is to protect against measures which by inadvertance or by conscious design are unclear, confusing, deceptive, or otherwise apt to pervert the deliberative or democratic functions of the legislature. But in spite of the lofty considerations behind these constitutional requirements, it is clear that a party seeking to have an act set aside on these grounds must establish that the alleged violation is substantial, clear and manifest. All doubts must be resolved in favor of the act's validity. See *Kerner v. Johnson*, 99 Idaho 433, 452, 383 P.2d 360 (1978); *Golconda Lead Mines v. Neill*, 82 Idaho 96, 102, 350 P.2d 221 (1960). Appropriations acts, though, appear to be especially vulnerable to abuse. For this reason, the courts may be less hesitant than normal to find a funding measure invalid on the basis of these constitutional safeguards. See, e.g., *Flanders v. Morris*, 88 Wash. 2d 183, 558 P.2d 769, 772 (1977); see generally, M. Rudd, *No Law Shall Embrace More Than One Subject*, 42 Minn. L. Rev. 389, 413-14 (1958).

2. §16: Unity of Subject Matter

The first part of §16 states that "[e]very act shall embrace but one subject and matters properly connected therewith." Idaho Constitution article 3, §16. The purpose of this provision is to protect the integrity of the substantive law-making process: (1) by facilitating legislative proposals; (2) by encouraging the development of a logical and ordered body of law; (3) by preventing "logrolling" and related practices¹⁶; and, (4) by ensuring that the governor's veto power remains effective. See *Golconda Lead Mines v. Neill*, 82 Idaho 96, 102, 350 P.2d 221 (1960); *Brown v. Firestone*, 382 So. 2d 654, 663-64 (Fla. 1980); *Flanders v. Morris*, 88 Wash 2d 183, 558 P.2d 769, 772 (1977); see generally, C. Sands, *Sutherland Statutory Construction* §17.01 (4th ed. 1972). M. Rudd, *No Law Shall Embrace More Than One Subject*, 42 Minn. L. Rev. 389, 390-92 (1958).

There is no uniform or precise test to determine whether a specific act addresses more than a single subject. In general, the courts have only required what they term "germaneness." This standard is often defined as a relation-

¹⁶"Logrolling" is a procedure in which several minority groups combine various proposals into a single bill and thus consolidate their votes and obtain a majority. A related tactic is to attach a controversial measure as a "rider" to another bill which is either very popular or, as in the case of an appropriations bill, essential to the operation of government.

ship between legislative subjects that is sufficiently "close," "appropriate," "related," or "pertinent." See 1A C. Sands, *Sutherland Statutory Construction* §17.03 (4th ed. 1972).

There are very few Idaho cases which have considered whether the unity of subject matter provision bars appropriations measures from amending, suspending or repealing existing substantive statutes. In the rather old case of *Hailey v. Huston*, 25 Idaho 165, 168, 136 P. 212 (1913) the Supreme Court held an appropriations act could not implicitly amend a statute setting the salary for the State Historical Society Librarian. In that case, the legislature had passed a measure appropriating more money to the librarian than he was entitled by statute to receive. The Auditor refused to sign a warrant for the increased amount and the librarian petitioned for a writ of mandamus. The court acknowledged that the legislature clearly intended to amend the salary statute by implication, but the court held, nevertheless, that the increased appropriation was invalid because it violated the unity of subject matter requirements of article 3, §16.¹⁷ *Id.* The same result was reached in a companion case involving an attempted salary increase for the Commandant of the Soldiers Home. *White v. Huston*, 25 Idaho 170, 136 P. 214 (1913). See also *State v. Gallet*, 36 Idaho 178, 209 P. 723 (1922) (approving *Hailey v. Huston*). Unfortunately, none of these cases provide analysis or cite authority.

Although *Hailey v. Huston* is analytically barren and rather dated, it is consistent with recent decisions from other jurisdictions. In the recent Washington case of *Flanders v. Morris*, 88 Wash. 2d 183, 558 P.2d 769 (1977), the legislature passed a supplemental appropriation for the general welfare account. The measure also contained a provision which prohibited use of the funds to aid any single person under the age of 50. This rider had the effect of implicitly amending an existing general statute establishing welfare qualifications. The court held that regardless of the clear expression of intent, the limitation was void because it violated the state's constitutional provisions requiring unity of subject matter.¹⁸ The court reasoned that appropriations bills by their very nature must not define substantive rights. Instead, such funding measures merely provide for the administration and enforcement of existing laws. *Id.* See *Brown v. Firestone*, 382 So. 2d 654, 664 (Fla. 1980) (similar result in suit by citizens and taxpayers for a writ of mandamus to set aside certain vetoes exercised by the governor — the governor argued that some of the provisions vetoed were unconstitutional because the legislature had violated unity of subject matter provisions).

3. §16: Unity of Subject and Title

The second part of article 3, §16 states that the subject of every act "shall be expressed in the title" and if the subject is not expressed, "such act shall be void only as to so much thereof as shall not be embraced in the title." This requirement is designed "to prevent fraud and deception in the enactment of laws and to provide reasonable notice to the legislators and the public of the

¹⁷The court also concluded that the attempted implied amendment violated the title provisions of §16 and the amendment provisions of §18. *Id.* These holdings are discussed in more detail below. The result reached in *Hailey v. Huston* has been questioned by one scholar because the subjects of the bill are arguably germane and no evidence of logrolling was introduced. See M. Rudd, *No Law Shall Embrace More Than One Subject*, 42 Minn. L. Rev. 389, 438-39 (1958).

¹⁸The constitutional requirement in question was almost identical to that found in article 3, §16 of the Idaho Constitution. *Flanders v. Morris*, 88 Wash. 2d 183, 558 P.2d 769, 773 (1977).

general intent and subject matter of an act.” *Kerner v. Johnson*, 99 Idaho 433, 452, 583 P.2d 360 (1978); see *Golconda Lead Mines v. Neill*, 82 Idaho 96, 102, 350 P.2d 221 (1960); *State ex rel. Wright v. Hedrick*, 65 Idaho 148, 158, 139 P.2d 761 (1943); *Federal Reserve Bank v. Citizens Bank & Trust Co.*, 53 Idaho 316, 323, 23 P.2d 735 (1933); see generally 1A C. Sands, *Sutherland Statutory Construction* §§17.01, 18.02 (4th ed. 1972).

In general, the title does not have to provide a complete catalogue of, or index to, the statute in question. Instead it simply must not be confusing, misleading or deceptive to the average reader. This test is met if “the body of the act is not broader than the title and does not encompass subjects which are not germane to, or which are incongruous with, the title.” *Kerner v. Johnson*, 99 Idaho 433, 452, 583 P.2d 360 (1978); see *Federal Reserve Bank v. Citizens Bank & Trust Co.*, 53 Idaho 316, 325 P.2d 735 (1933); 1A C. Sands, *Sutherland Statutory Construction* §18.02 (4th ed. 1972).

Once again, the paucity of causes interpreting this section makes it difficult to apply the rule to the present set of facts. In *Hailey v. Huston*, discussed above, the court held that a legislative appropriation could not implicitly amend an existing salary statute because even if the unity requirement had been met, the additional appropriation still would have fallen afoul of §16’s title requirements. *Hailey v. Huston*, 25 Idaho 165, 168, 136, P. 212 (1913). Aside from the *Hailey* case, there is no local authority on this issue. It may be important to note, though, that the Idaho court traditionally has taken a strict view of this constitutional requirement when finance and appropriations bills are involved. See *State ex rel. Wright v. Hedrick*, 65 Idaho 148, 158, 139 P.2d 761 (1943); *In re Edwards*, 45 Idaho 676, 691, 266 P. 665 (1928). The result reached by the Idaho court in *Hailey v. Huston* is also supported by decisions rendered in other jurisdictions. See, e.g., *Flanders v. Morris*, 88 Wash. 2d 183, 558 P.2d 769, 772 (1977) (discussed above).

4. §18: No Amendments by Reference to Title

Article 3, §18 of the Idaho Constitution provides that “[n]o act shall be revised or amended by mere reference to its title, but the section as amended shall be set forth.”

The mischief designed to be remedied was the enactment of amendatory statutes in terms so blind that legislators themselves were sometimes deceived in regard to their effect, and the public, from the difficulty in making the necessary examination and comparison, failed to become apprised of the changes made in the laws. An amendatory act which purports only to insert certain words, or to substitute one phrase for another in an act or section, which was only referred to, but not published, was well calculated to mislead the careless as to its effect, and was, perhaps, sometimes drawn in that form for that express purpose. Endless confusion was thus introduced into the law, and the constitution wisely prohibited such legislation. *Kerner v. Johnson*, 99 Idaho 433, 453, 583 P.2d 360 (1978) (quoting *Noble v. Bragaw*, 12 Idaho 265, 277, 85 P. 903, 906 (1906)).

The courts have tended to construe this constitutional requirement narrowly, since a broad construction would create an immense drafting burden. As a result, the almost universal rule is that the provision does not apply to

express repeals¹⁹ and it does not necessarily prohibit implied repeals or amendments. Specifically, the section does not apply if the repealing or amending act is both complete in itself and an original and independent legislative action. See *Kerner v. Johnson*, 99 Idaho 433, 453, 583 P.2d 360 (1978); *Golconda Lead Mines v. Neill*, 82 Idaho 96, 99-100, 350 P.2d 221 (1960); see generally 1A C. Sands, *Sutherland Statutory Construction* §22.16 (4th ed. 1972).

Arguably, appropriations acts are original, independent and complete legislative actions, and, as such, implied repeals or suspensions of substantive statutes should not fall under §18's prohibitions. Apparently, however, this is not the result that many courts have reached. Again, the only helpful Idaho case is *Hailey v. Huston*, 25 Idaho 165, 168, 136 P. 212 (1913), discussed above. There, the Idaho Supreme Court determined that even if the legislature's attempt to implicitly amend the existing salary statute had not violated the provisions of article 3, §16, the act nevertheless failed to meet the requirements of article 3, § 18. The court failed once again to disclose its reasoning.

Recent decisions from other jurisdictions support the result reached in *Hailey*. In *Washington Education Association v. State*, 99 Wash. 2d 37, 604 P.2d 950 (1980), a teacher's union challenged a legislative appropriation for basic education which was conditioned on the requirement that no district grant pay raises above a certain level. Because of this limitation, the act had the effect of amending by implication existing statutes which granted individual districts the authority to set pay scales. The Washington court acknowledged that the legislature had the power to make such a law, but the court held, nevertheless, that the limitation was invalid because it failed to comport with the constitutional requirement that all amendments be set out in detail. *Id.* at 951-52.²⁰ The *Washington Education Association* court concluded that the appropriations act in question failed to meet two tests designed to insure that all the objectives of the constitutional provision were met. The court noted: First, the new enactment was not "such a complete act that the scope of the rights or duties created or effected by the legislative action can be determined without referring to any other statute or enactment." And, second, "a straightforward determination of the scope of rights and duties under the existing statutes would have been rendered erroneous by the new enactment." *Id.* at 953.

The court in *Washington Education Association* relied heavily on the earlier case of *Flanders v. Morris*, 88 Wash. 2d 183, 558 P.2d 769 (1977) discussed above. In *Flanders*, the court noted that "the result desired by such a provision is to have in a section as amended a complete section, so that no further search will be required to determine the provisions of such section as amended." *Id.* at 773. For this reason, "it is not necessary that a given provision have effect in perpetuity . . . to be stricken from an appropriations bill as a substantive amendatory law." *Id.* at 774.

5. Application to Implied Repeal

If the appropriations act for the Division of Environment is construed to implicitly repeal, suspend, or amend any existing substantive statutes the

¹⁹The Idaho Court has stated that a repeal is the complete "abrogation or destruction by law" of a prior legislative act, while an amendment is only an "alteration or change." See *Golconda Lead Mines v. Neill*, 82 Idaho 96, 99-100, 350 P.2d 221 (1960). As a consequence, it is probably better to treat the possible statutory suspension in question here as an amendment rather than a repeal.

²⁰The provision in question was almost identical to Idaho's article 3, §18.

validity of these implied provisions could be attacked as violative of Idaho Constitution article 3, §§16 and 18. The discussion above indicates that there is a significant chance that one or more of the constitutional challenges might prevail. Thus, it is very unlikely that a court would construe the appropriations act to contain such implied provisions, since it is a firmly established principle of statutory construction that no enactment shall be interpreted in a manner that renders it unconstitutional if another reasonable construction is available. *See, e.g., Leonardson v. Moon*, 92 Idaho 796, 806, 451 P.2d 542 (1962).

6. Application to Qualified Appropriations

As a general rule the legislature has the power to withhold funds entirely from a program, position, or agency, even if the resulting inaction has the effect of modifying substantive statutes. *See, M. Rudd, No Law Shall Embrace More Than One Subject*, 42 Minn. L. Rev. 389, 435-36 (1958). There is a split of authority, however, regarding whether the legislature has the authority to make an appropriation but condition funding in such a manner that an existing statute is in effect repealed, suspended or amended. *See generally id.* at 434-44.

If it can be established that an appropriations bill containing an unconstitutional repeal, or suspension or amendment was the product of actual "log-rolling", a court might hold that the entire act is invalid. *See, id.* at 440. In the absence of such proof, some courts will find that the underlying appropriation is valid, but that the qualification on the use of funds is not. This is apparently the result reached by the Washington court in *Flanders and Washington Education Association* cases discussed above. In *Flanders* the court stated: "We realize that in certain instances the legislature must place conditions and limitations on the expenditures of monies, but to the extent that such conditions or limitations on the expenditures of monies, but to the extent that such conditions or limitations have the effect of modifying or amending the general law they are unconstitutional enactments." *Flanders v. Morris*, 88 Wash. 2d 183, 558 P.2d 769, 775 (1977).

Other courts, however, have concluded that while the constitutional provisions do prevent qualifications on appropriations measures from implicitly repealing, suspending or amending substantive laws, such qualifications are nevertheless valid limitations on the money allocated. In *Colombini v. Director of Michigan Department of Social Services*, 93 Mich. App. 157, 286 N.W.2d 77 (1979) the legislative appropriation for a welfare program provided that until certain conditions were met no funds could be used for a client reporting system previously authorized by statute. The court held that the failure to appropriate money for a particular program should not be construed as a repeal or amendment of prior substantive laws, but rather as a political decision not to provide funds for a specific program. Further, the court reasoned that the power to make such political decisions was reserved to the legislature by constitutional and statutory provisions which proscribe payments from the state treasury for any program in the absence of a specific appropriation. *Id.* at 80-81.²¹

Other jurisdictions have adopted rules in which some but not all qualifications are valid. In *Firestone v. Brown*, 382 So. 2d 654 (Fla. 1980), discussed above, the court concluded that the constitutional provisions in question

²¹Idaho has similar provisions. *See* Idaho Constitution article 7, §13; *Idaho Code* §67-3516.

will countenance a qualification or restriction only if it directly and rationally relates to the purpose of an appropriation and, indeed, if the qualification or restriction is a major motivating factor behind enactment of the appropriation. That is to say, has the legislature in the appropriations process determined that the appropriation is worthwhile or advisable only if contingent upon a certain event or fact, or is the qualification or restriction being used merely as a device to further a legislative objective unrelated to the fund appropriated? This test possesses the dispositive virtue of permitting the legislature reasonably to direct appropriations use without hampering the gubernatorial veto power or abusing the legislative process. *Id.* at 664.

The rules discussed above are somewhat difficult to apply to the present set of facts. The legislature's decision not to provide any funds for the Air Quality Bureau would be constitutionally valid. If it should be determined, however, that the Water Quality and Hazardous Materials Program appropriation contained implied proscriptions on the use of funds for certain water quality programs or field office personnel, a substantial constitutional issue exists. Certain resolution of this issue is not possible until the Idaho Supreme Court indicates which of the rules discussed above it will adopt. There is, however, at least some possibility that such implied limitations would be found invalid.

QUESTION #3: Possibility of citizen suits to compel law enforcement.

A. CITIZEN SUITS IN GENERAL

A citizen suit to compel the enforcement of air pollution control statutes and regulations would most likely be framed as an action at law for a writ of mandate under *Idaho Code* §7-301 et seq. A possible alternative would be an equitable action for a mandatory injunction under Rule 65 of the Idaho Rules of Civil Procedure.²² To some extent the two remedies are interchangeable, although injunctions have traditionally been used primarily to restrain improper official conduct, while writs of mandate have been used to force proper official conduct. *Miguel v. McCarl*, 291 U.S. 442 (1934); *Murtaugh Highway District v. Merriots*, 59 Idaho 605, 85 P.2d 685 (1938). Courts are inclined to refrain from using their equitable powers, such as injunctions, when a legal remedy, such as mandamus, is adequate. As a practical matter, the two remedies are similar enough in theory and application to be analyzed together in the context of the question presented.

The judiciary is reluctant to use either remedy against a coordinate branch of government. If the issue involves the exercise of discretion imposed by law upon the executive branch, neither mandamus nor injunctive relief will be granted. *E.g.*, *National Wildlife Federation v. United States*, 626 F.2d 917 (1980). Generally speaking, only the ministerial functions of public officials are subject to judicial oversight via mandamus or injunction.

²²A more remote third possibility would be implied private cause of action that would allow citizens to sue polluters directly under the Environmental Protection and Health Act of 1972 and its regulations. The act does not provide a direct action private remedy, relying instead primarily on the public administrative law remedies set forth in *Idaho Code* §39-108. In this circumstance the rebuttable presumption of law would be that the legislature did not intend to grant a general, private enforcement cause of action. See Note, *Implied Causes of Action in the State Courts*, 30 Stanford L. Rev. 1243 (1978).

B. DEFENSES TO CITIZEN SUITS

1. Discretionary Functions

The Environmental Protection and Health Act of 1972 delegates legislative rulemaking authority to the Board of Health and Welfare, while vesting enforcement responsibility in the Director of the Department of Health and Welfare. The act is based on an express state policy recognizing that "the protection of the environment and the promotion of personal health are vital concerns." *Idaho Code* §39-102. The rules and regulations of the board are established as part of the *Idaho Code* and have the "force and effect of law," according to *Idaho Code* §39-107(8). The board's function is clearly discretionary, as *Idaho Code* §39-107(8) also provides that the board "may adopt" such rules and regulations as are "necessary and feasible" to carry out the "purposes and provisions" of the act.

Among the purposes and provisions of the act are the vesting of responsibility in the director to supervise and administer "a system to safeguard air quality and for limiting and controlling the emission of air contaminants" under the board's rules and regulations. *Idaho Code* §39-105(3). The director is further required by *Idaho Code* §39-108 to "cause investigations to be made upon receipt of information concerning an alleged violation of this act or of any rule or regulation promulgated thereunder." Although the Director's duties to administer the air program and to investigate violations are couched in mandatory "shall" language, the Director is given wide latitude in determining how to deal with any air pollution problem that is uncovered. The Director can enter into voluntary compliance schedules with polluters under *Idaho Code* §39-116; he can initiate an administrative enforcement action under *Idaho Code* §39-108; he can refer the matter to the attorney general's office for injunctive proceedings under *Idaho Code* §39-108; or, he can refer the matter to a prosecuting attorney as a misdemeanor under *Idaho Code* §39-117.

As the preceding analysis indicates, the functions of both the Board and the Director under the Environmental Protection and Health Act are primarily discretionary rather than ministerial. See ANALYSIS: QUESTION #3, *infra*, (definition of ministerial function). Both offices are infused with the responsibility for making informal judgments based upon the knowledge and experience of their incumbents.

The Board's rulemaking activities require the exercise of the sort of "considerable judgment" recognized by the Idaho Supreme Court in *Allen v. Smylie*, 92 Idaho 846, 452 P.2d 343 (1969) as totally insulating the state land board from mandamus actions over the issuance of mineral leases to "secure the maximum amount" possible for mineral rights. *Allen* was cited with approval in *Wycoff v. Board of County Commissioners of Ada County*, 101 Idaho 12, 607 P.2d 108 (1980). Also consistent with *Allen* was *Fritchman v. Athey*, 36 Idaho 560, 211 P. 1080 (1922) where the discretion of a state commission to locate tuberculosis hospitals "as near the center of the districts as possible," was held not subject to injunction.

However, in the more recent case of *Kolp v. Butte County School District Board of Trustees*, ___ Idaho ___, ___ P.2d ___, 81 ISCR 71 (Feb. 27, 1981) a majority of the court did not refer to *Allen*. *Kolp* was a mandamus action brought by a teacher against a school board that fired him for using corporeal

punishment. The court, with the exception of dissenting Justice Shepard,²³ ignored *Allen* and relied instead upon an earlier decision, *Wellard v. Marcum*, 82 Idaho 232, 351 P.2d 482 (1960), involving a determination by school district trustees to close a grade school. Denying the writ in both *Kolp* and *Wellard* the court enunciated the following rule of law:

Proceedings of this nature for writ of mandate are not available to review the acts of boards in respect to matters as to which they are vested with discretion, unless it clearly appears that they have acted arbitrarily and unjustly in abuse of the discretion vested in them. *Kolp*, 81 ISCR at 72 (quoting *Wellard*, 82 Idaho at 236, 351 P.2d at 484).

The court in *Kolp* added as a further prerequisite for mandamus that "there is not available other plain, speedy and adequate remedy in the ordinary course of law". *Kolp*, 81 ISCR at 73. In light of *Kolp* it appears that the Director of the Department of Health and Welfare and the Department of Health and Welfare cannot rely upon the blanket immunity for discretionary functions set forth in *Allen*.

Nevertheless, the Director and the Board would seem to be protected from mandamus actions so long as they follow statutory procedures and perform their duties in a reasonable and nonabusive manner. In footnotes 2 and 4 the *Kolp* court commented that the standard of proof for showing the appropriateness of mandamus was high — in effect, a board must abuse its discretion to the point of neglecting or refusing to exercise any discretion at all. Under *Kolp* it appears that policy making and policy enforcing decisions by public officials are exempt from mandamus so long as the decisions are substantive rather than procedural and are based on some "apparent cause." *Id.* at note 4.

In addition to the protection afforded by *Kolp* and the other cited cases, the Director, as enforcer of the Board's regulations, partakes of the discretionary immunity from suit traditionally afforded to prosecuting attorneys. *Cf. State v. Horn*, 101 Idaho 192, 610 P.2d 551 (1980) (prosecutors' immunity recognized); *State ex rel. Bar Realty Corp. v. Locher*, 30 Ohio St. 2d 190, 283 N.E.2d 164 (1972) (water pollution control commissioner had discretion to issue or not to issue orders to abate pollution and is not subject to mandamus).

In summary, so long as the Board and the Director act within the statute and do not abuse the discretion which has been reposed in them they are subject to no control except that of the legislature. 52 Am. Jur. 2d, *Mandamus* §164 (1970); *Potlatch Lumber Co. v. Board of County Commissioners*, 19 Idaho 516, 160 P. 260 (1916).

2. Financial Impossibility

At the same time it is clear that the legislature in fact exerts substantial power over the Board and the Director through the power of the purse. No

²³The majority opinion in *Kolp* appears to have been a compromise decision. Justice Shepard's dissent strongly objected to judicial intrusion via mandamus in any discretionary determination by administrative agencies. On the other hand, Justice Bistline's dissent went the opposite way. He would do away with any limits on the availability of mandamus to challenge agencies' discretionary actions.

money can be spent by any state agency without an appropriation from the legislature. As the analysis accompanying the answers to the first two questions of this opinion explains, there is no appropriation for operation of an air pollution program during fiscal year 1981. Therefore, no money can be spent by the department on such activities. See ANALYSIS: QUESTION #1, part A, *supra*.

Promulgation and enforcement of air pollution regulations is not feasible without an appropriation of money for those purposes by the legislature. Regulations affecting industrial processes must be constantly updated and refined in order to take into consideration changes in technology. Engineers, meteorologists and other trained government personnel must be available to apply those regulations to particular situations. Regulations affecting commonplace activities, such as open burning or odor control, require even-handed and consistent enforcement if they are not to be applied unfairly in a hit-or-miss fashion. Consequently, continued promulgation and enforcement of the air regulations is no longer "feasible" for the Board and Department.

In fact, by July 1, 1981 when the entire staff of the Air Quality Bureau has been dismissed and the state's monitoring equipment has been scrapped, mothballed or turned over to the U.S. Environmental Protection Agency, enforcement of the air regulations will be impossible. Impossibility of performance is a long-recognized defense to a citizen complaint against official inaction. See *State Tax Commission v. Johnson*, 75 Idaho 105, 111, 269 P.2d 1080, 1083 (1954) (dicta) (and cases cited therein). Among the species and subspecies of impossibility recognized by the Idaho Supreme Court is financial impossibility.

The leading Idaho case recognizing financial impossibility as a defense to a citizen suit is *Cowan v. Lineberger*, 35 Idaho 403, 206 P. 805 (1922). The action was in mandamus, brought by an irrigation district patron to force his district board to deliver water to his property without receiving an advance payment of \$7.50 per acre to cover Idaho Power Company prepayment requirements. The decision of the court denied mandamus because:

It is clear that where an irrigation district is without funds or the necessary credit to pay for the delivery of water, a writ of mandate against the board of directors will not lie to compel a delivery of water to the users, since the courts will not issue a command to the officers of a municipal corporation which such officers cannot obey. *Id.* at 408.

The *Cowan* decision directly supports the proposition that neither the Board nor the Director can be required by legal action to do that which they are financially incapable of doing.

An Ohio decision, *State, ex rel. Brown, v. Board of County Commissioners*, 21 Ohio St. 2d 64, 255 N.E.2d 244 (1970), strongly reinforces the holding in *Cowan* in a factual situation similar to the one at issue. The Ohio Supreme Court was faced with a mandamus action brought by the attorney general against a county commission for failure to appropriate statutorily prescribed funds for welfare recipients. The county asserted that it could not financially provide the required sums for the public assistance and still provide for the operation of its other functions. Rather than interject a judicial determination of how county funds should be apportioned among competing programs the court denied the writ of mandate, stating:

where . . . there is not enough money available for respondents to provide for such deficit and to provide also for the full operation of all county offices, thereby seeking to require respondents to perform an act which is impossible to perform because of lack of funds, the writ will be denied. *Id.* at 66, 246.

The *Brown* holding seems to sanction the practice of programmatic triage by administrative agencies. Where there is not enough money to finance all of the agency's statutorily imposed duties, the Ohio court would leave the decision of which programs will take priority up to the executive agency involved. Thus, a decision by the Board of Health and Welfare or the Director of the Department of Health and Welfare to terminate enforcement of air quality regulations due to budgetary constraints would not be subject to contest even though there might be funds appropriated to the department for other purposes that could conceivably be diverted to operating an air quality program.

ANALYSIS:

4. Possibility of the state and its officers being found liable for damages caused by lack of enforcement of air pollution laws.

A. IMMUNITY OF PUBLIC OFFICIALS IN GENERAL

Persons performing public functions are generally afforded a broad privilege against being held personally liable for actions taken in their public role. The reason for the privilege is the perception that public officials must be free to do their jobs without fear that in doing so their private interests may be affected. *Restatement (Second) of Torts* §10 (1965). Several related rationales have been propounded to accomplish this end.

For example, the doctrine of official immunity provides that a public official is not personally liable for damages as a result of an act within the scope of his official authority and in the line of his official duty. In addition, the doctrine of discretionary immunity holds that state officials and employees may be held liable only in the performance of ministerial rather than discretionary duties. A ministerial duty is defined as one in which nothing is left to discretion, a simple definite duty arising under and because of stated conditions and imposed by law. Under the doctrine of discretionary immunity an official who was immune from an action to compel performance of a discretionary statutory duty would also be immune from an action for damages. *See* ANALYSIS: QUESTION 3, *supra*. Finally, under the separate doctrine of sovereign immunity, an action against a state official, if it is tantamount to an action against the state itself, is subject to the same principles of sovereign or governmental immunity as an action against the state. 1B J. Dooley, *Modern Tort Law* §21.09 (B. Lindahl and S. Flanagan, ed., Supp. 1980).

1. The Statutory Framework

The expression of legislative intent which accompanied the 1976 revision of the Idaho Tort Claims Act codified the common law principles set out above.

The legislature of the state of Idaho hereby finds and declares that exposure of public employees to claims and civil lawsuits for acts or omissions within the course or scope of their employment has a chilling effect upon the performance of their employment duties and is an

obstacle to the discharge of public business. It is the declared intention of the state of Idaho to relieve public employees from all necessary legal fees and expenses and judgments arising from such claims and civil lawsuits unless the act or omission complained of includes malice of criminal intent. The legislature further declares that the expenditure of public moneys to this end is for a public purpose. 1976 Idaho Sess. Laws ch. 309 §1.

Failure to provide an air program because of lack of an appropriation could not be construed to be motivated by malice or criminal intent on the part of the Board of Health and Welfare or the Director of the Department of Health and Welfare. The provisions of the act, in particular, *Idaho Code* §§6-903 and 6-904 make it clear that should the Board of Health and Welfare be sued for failure to provide an air pollution program the state would assume all responsibility.

2. Judicial Precedent

Furthermore, according to *Dunbar v. United Steelworkers of America*, 100 Idaho 523, 602 P.2d 21 (1979), *cert. denied*, 446 U.S. 983 (1980), the state could not be held liable for any damages arising from an ineffective air program. *Dunbar* involved wrongful death actions against the state and its governor by the survivors of workers killed in a mine fire. The plaintiffs charged that the state failed to enforce a statutorily-mandated elementary accident prevention program; that the governor negligently selected and directed the state mine inspector; and, that the inspector and his deputies were negligent in inspecting the mine. The state defended itself and its employees by relying on the Tort Claims Act exemption for "discretionary" duties. *Idaho Code* §6-904 exempts a governmental entity and its employees from liability for any claim which:

Arises out of any act or omission of an employee of the governmental entity exercising ordinary care, in reliance upon or the execution or performance of a statutory or regulatory function, whether or not the statute or regulation be valid, based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused.

The court held that no tort liability could attach to the state for exercise of its "governmental function of governing." *Id.* at 44. The *Dunbar* decision has since been explained by the court as holding that no cause of action is allowed by the Tort Claims Act directed at, "the abilities of officials, the enactment of regulations, and the alleged lack of enforcement of statutes, regulations and standards." *Gavica v. Hanson*, 101 Idaho 58, 608 P.2d 861 at 868 (1980).

c. Conclusion

The activities of the unfunded air program were purely regulatory in nature. Neither the state nor its employees are subject to suit for failure to carry out the duties associated with that program after its funding runs out.

AUTHORITIES CONSIDERED:

1. *Idaho Constitution* article 3, §§16 and 18.
2. *Idaho Constitution* article 7, §13.

3. *Idaho Code* §§6-903 to 904.
4. *Idaho Code* §7-301.
5. *Idaho Code* §§39-101 to 102, 105, 107-108, 116 and 117.
6. *Idaho Code* §67-435.
7. *Idaho Code* §67-3514.
8. *Idaho Code* §67-3516.
9. 1980 Idaho Sess. Laws, chapters 307, 347, 366.
10. 1976 Idaho Sess. Laws, chapter 309 §1.
11. Idaho R. Civ. P. 65.
12. *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978).
13. *Securities and Exchange Commission v. Sloan*, 436 U.S. 103 (1978).
14. *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974).
15. *United States v. Dickerson*, 310 U.S. 554 (1940).
16. *Miguel v. McCarl*, 291 U.S. 442 (1934).
17. *United States v. Lexington Mill & Elevator Co.*, 232 U.S. 399 (1914).
18. *National Wildlife Federation v. United States*, 626 F.2d 917 (1980).
19. *Hodgson v. Board of County Commissioners*, 614 F.2d 601 (8th Cir. 1980).
20. *Sierra Club v. Andrus*, 610 F.2d 581 (9th Cir 1980).
21. *Friends of the Earth v. Armstrong*, 485 F.2d 1 (10th Cir. 1973), *cert. denied*, 414 U.S. 1171 (1974).
22. *Environmental Defense Fund v. Froehlke*, 473 F.2d 346 (8th Cir. 1972).
23. *Committee for Nuclear Responsibility v. Seaborg*, 149 U.S. App. D.C. 380, 463 F.2d 783 (1971).
24. *Planned Parenthood Affiliates of Ohio v. Rhodes*, 477 F. Supp. 529 (S.D. Ohio 1979).
25. *Kolp v. Butte County School District Board of Trustees*, ___ Idaho ___, ___ P.2d ___, 81 ISCR 79 (Feb. 27, 1981).
26. *State v. Horn*, 101 Idaho 192, 610 P.2d 551 (1980).
27. *Garcia v. Hanson*, 101 Idaho 58, 608 P.2d 861 (1980).

28. *Wycoff v. Board of County Commissioners*, 101 Idaho 12, 607 P.2d 108 (1980).
29. *Dunbar v. United Steelworkers of America*, 100 Idaho 573, 602 P.2d 21 (1979), *cert. denied*, 446 U.S. 983 (1980).
30. *State v. Rawson*, 100 Idaho 308, 597 P.2d 31 (1979).
31. *Local 1494 of the International Association of Firefighters v. City of Coeur d'Alene*, 99 Idaho 630, 586 P.2d 1346 (1978).
32. *Kerner v. Johnson*, 99 Idaho 433, 383 P.2d 360 (1978).
33. *County of Ada v. Idaho*, 93 Idaho 830, 475 P.2d 367 (1970).
34. *Allen v. Smylie*, 92 Idaho 846, 452 P.2d 343 (1969).
35. *Leonardson v. Moon*, 92 Idaho 796, 451 P.2d 542 (1962).
36. *State v. Adams*, 90 Idaho 195, 409 P.2d 415 (1965).
37. *Knight v. Employment Security Agency*, 88 Idaho 262, 398 P.2d 643 (1965).
38. *State v. Roderick*, 85 Idaho 80, 375 P.2d 1005 (1962).
39. *Wellard v. Marcum*, 82 Idaho 232, 351 P.2d 482 (1960).
40. *Golconda Lead Mines v. Neill*, 82 Idaho 96, 350 P.2d 221 (1960).
41. *State Tax Commission v. Johnson*, 75 Idaho 105, 269 P.2d 1080 (1954).
42. *In re Gem State Academy Bakery*, 70 Idaho 531, 224 P.2d 529 (1950).
43. *State ex rel. Wright v. Hendrick*, 65 Idaho 148, 139 P.2d 761 (1943).
44. *Murtaugh Highway District v. Merrits*, 59 Idaho 605, 85 P.2d 685 (1938).
45. *Federal Reserve Bank v. Citizens Bank & Trust Co.*, 53 Idaho 316, 23 P.2d 735 (1933).
46. *In re Edwards*, 45 Idaho 676, 266 P. 665 (1928).
47. *Fritchman v. Athey*, 36 Idaho 560, 211 P. 1080 (1922).
48. *State v. Gallet*, 36 Idaho 178, 209 P. 723 (1922).
49. *Cowen v. Lineberger*, 35 Idaho 403, 206 P. 805 (1922).
50. *Herrick v. Gallet*, 35 Idaho 13, 204 P. 477 (1922).
51. *Epperson v. Howell*, 28 Idaho 338, 154 P. 621 (1916).
52. *White v. Huston*, 25 Idaho 170, 136 P. 214 (1913).

53. *Hailey v. Huston*, 25 Idaho 165, 136 P. 212 (1913).
54. *Potlatch Lumber Co. v. Board of County Commissioners*, 19 Idaho 516, 160 P. 260 (1916).
55. *Noble v. Bragaw*, 12 Idaho 265, 85 P. 903 (1906).
56. *Brown v. Firestone*, 382 So. 2d 654 (Fla. 1980).
57. *Director of the Civil Defense Agency v. Legor*, 404 N.E.2d 679 (Mass. App. 1980).
58. *Colombini v. Director of Michigan Department of Social Services*, 93 Mich. App. 157, 786 N.W.2d 77 (1979).
59. *City of Camden v. Byrne*, 82 N.J. 133, 411 A.2d 462 (1979).
60. *Data Access Systems, Inc. v. State Bureau of Securities*, 63 N.J. 158, 305 A.2d 427 (1973).
61. *New York Public Interest Research Group v. Carey*, 55 App. Div. 2d 274, 236 N.Y.S. 2d 155 (1977), *appeal dismissed*, 41 N.Y. 2d 1072, 364 N.E.2d 84, 396 N.Y.S.2d 155 (1977).
62. *State ex rel. Bar Realty Corp. v. Locher*, 30 Ohio St. 2d 190, 283 N.E.2d 164 (1972).
63. *State ex rel. Brown v. Board of County Commissioners*, 21 Ohio St. 2d 64, 255 N.E. 2d 244 (1970).
64. *Washington Education Association v. State*, 99 Wash. 2d 37, 604 P.2d 950 (1980).
65. *Flanders v. Morris*, 88 Wash. 2d 183, 558 P.2d 769 (1977).
66. *Ex Parte Williamson*, 116 Wash. 560, 200 P. 329 (1921).
67. *House Journal* at 339, 344, 46th Leg., 1st Reg. Sess. 1981.
68. *Senate Journal* at 256-57, 46th Leg., 1st Reg. Sess. 1981.
69. Joint Finance-Appropriations Committee, *Rules of Procedures*, Rules 5 and 8 (Dec. 1980).
70. Note, *Implied Causes of Action in State Courts*, 30 Stanford L. Rev. 1243 (1978).
71. Note, *Legislative Bargains and the Doctrine of Repeal by Implication*, 46 Univ. Colo. L. Rev. 289 (1974).
72. M. Rudd, *No Law Shall Embrace More Than One Subject*, 42 Minn. L. Rev. 389 (1958).
73. 1B J. Dooley, *Modern Tort Law* §21.09 (B Lindahl and S. Flanagan, ed., Supp. 1980).

74. 1A C. Sands, *Sutherland Statutory Construction*, §§17.01, 17.03, 18.02, 22.16, 23.09-.10, 32.03 (4th ed. 1972).
75. 2A C. Sands, *Sutherland Statutory Construction*, §§47.01, 48.01, 48.06, 48.13-16 (4th ed. 1972).
76. *Restatement (Second) of Torts* §10 (1965).
77. 52 Am. Jur. 2d *Mandamus* §164 (1970).
78. *The Idaho Statesman*, March 17, 1981, at 8A.

DATED this 1st day of June, 1981.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

DHL/JJH/LJK/slo

ANALYSIS BY:

JOHN J. HOCKBERGER, JR.
Deputy Attorney General

LARRY J. KNUDSEN
Deputy Attorney General

cc: Idaho Supreme Court
Idaho Supreme Court Law Library
Idaho State Library

ATTORNEY GENERAL OPINION NO. 81-14

TO: Jerry L. Evans
State Superintendent of Public Instruction
Statehouse Mail

Per Request for Attorney General Opinion

QUESTION PRESENTED:

House Bill No. 443 in essence allows for the use of monies from the ten percent fund to supplement general account monies for the purpose of financing the general operating budget of the Department of Lands. Given the legislative intent and purpose of *Idaho Code* §58-140, establishing the ten percent fund, may such monies be expended for the general operating budget of the Department of Lands?

CONCLUSION:

Monies from the ten percent fund must be expended for capital improvements upon the same endowment land from which the monies were derived. To the extent that House Bill 443 can be construed to authorize expenditure of ten percent monies for purposes other than capital improvements, such as general operating expenses of the Department of Lands, or which may benefit other lands than the specific endowment lands from which the monies were derived, the result is illegal and unconstitutional.

ANALYSIS:

The resolution of your question requires an analysis of the statutory and constitutional limitations of the public school fund and the ten percent fund. This analysis will consist of a review of the laws pertaining to these funds, a discussion of the parameters of proper expenditures of the ten percent fund, and consider the propriety of expenditures from the ten percent fund for general operating expenditures.

When Idaho was admitted to the Union in 1890 the United States granted to it certain lands within the state boundaries for educational purposes. Sections numbered 16 and 36 in each township which had not been otherwise disposed of by act of Congress were granted to the state for the support of common schools. These are referred to as school lands or endowment lands. Idaho Admission Bill, § 4. Income received from the sale, lease, or use of these lands is placed in the public school fund. The authors of the Idaho Constitution defined the public school fund in Article 9, §4, as consisting of the proceeds from the school lands, lands granted by the United States in lieu thereof, and gift and escheat lands received by the state. In Article 9, §3 of the Idaho Constitution, the public school fund was reserved to "... forever remain inviolate and intact. ..." with expenditures authorized solely for the maintenance of the schools of the state.

In 1969, the Idaho Legislature passed House Bill No. 290 creating the ten percent fund, Section 1 of which stated:

It is hereby declared to be for the best interests of the State of Idaho and for the designated beneficiaries of the several endowment land grants held in trust by the State of Idaho from the United States Government, to provide for the maintenance and protection of the market value of state owned timberlands, grazing lands and recreation site lands. 1969 Idaho Sess. Laws, ch. 129, §1.

Section 2 thereof was codified as *Idaho Code* §58-140 which reads in part as follows:

A reasonable amount not to exceed ten per centum (10%) of the monies received from the sale of standing timber, from grazing leases and from recreation site leases shall constitute a special fund, which is hereby created to be used for maintenance, management and protection of state owned timberlands, grazing lands and recreation site lands: provided, that any monies constituting part of such fund received from a sale of standing timber or from leases of lands which are a part of any endowment land grant shall be used only for the maintenance, management and protection of lands of the same endowment grant. Provided further, that all such funds collected from timber sales shall be expended solely for the purpose of management, protection and reforestation of state lands. All such funds collected from recreation site leases shall be expended for the maintenance, protection and improvement of both new lease sites, and existing recreation areas situated on state lands. All such funds collected from grazing leases shall be expended for the maintenance, management and protection of state owned grazing lands.

This statute authorizes the "ten percent fund" consisting of up to ten percent of the monies received from three sources: timber sales, grazing leases, and recreation site leases. The stated purpose of the fund for grazing and recreation site lands is maintenance, management and protection; for timberlands, management, protection, and reforestation. The first proviso in the statute explicitly requires that monies derived from endowment lands (school lands) "... shall be used only for the maintenance, management and protection of lands of the same endowment grant."

Since its inception, the ten percent fund has been utilized strictly as a *reinvestment* upon the lands from which the monies accrued. These have been capital expenditures enhancing the market value, productivity, and income capacity of specific endowment lands. Ten percent fund expenditures have included tree planting, thinning of immature timber stands, reseeding, pre-commercial thinning including overstory removal, fertilization practices designed to produce a greater yield, and genetic tree development. These capital expenditures have included monies for contracting, salaries, and administrative services necessary to implement specific projects of capital improvements upon the same endowment lands from which the monies accrued.

House Bill No. 443, which set the Fiscal Year 82 appropriations for the Department of Lands, reduced general funding for the department's Program 03, Fund 1101 (General Fund), by approximately \$200,000, and Program 04, Fund 1101, by approximately \$30,000. Further, it appropriated approximately \$230,000 from the ten percent fund to finance expenditures in Programs 03 and 04, Fund 1101. (The original recommendation was for an appropriation of

\$1,000,000.) The department's Program 03 consists of expenditures for regular timber management, standard timber sales, general harvesting of mature timber, administrative expenses from miscellaneous matters such as rights-of-way and trespass, and also expenses for woodland foresters in the private foresters program on non-endowment lands. Program 04 involves expenditures for general administration of state owned rangelands. Both Programs 03 and 04 encompass services benefitting the general public and general preparatory work for timber and land management which do not directly relate to specific endowment lands. Additionally, employees of the Department of Lands, financed by general fund monies, are charged with numerous regulatory duties affecting privately and federally owned lands in Idaho. The Department of Lands has reported that employees within the general timber management program work between ten and forty percent of their time on dredge mining, surface mining, lake protection, slash control, and other regulatory functions. The Department of Lands also expends general fund monies on necessary administrative services in support of timber and land management and regulatory duties.

The analysis begins with an interpretation of the relevant statute. The use of the monies in the ten percent fund, as declared by *Idaho Code* §58-140, is reserved for the "maintenance, management and protection" of state lands, and the "management, protection and reforestation" of state timberlands. Moreover, there is an explicit requirement that the monies be utilized upon the same endowment lands from which they were derived. This office has been informed by the Department of Lands that substantially all of the monies in the ten percent fund have accrued from endowment lands. Therefore, any attempt to utilize the ten percent monies for general operating expenses or for purposes other than capital improvements on endowment lands must fail as manifestly contrary to the express language of §58-140. A similar incongruity results in an attempt to use the ten percent monies for general operating expenditures on endowment lands. It would be extremely difficult, if not impossible, to segregate accurately the general operating and administrative expenses among the respective endowments. Moreover, an attempt by the Department of Lands to prorate salaries, equipment, office space, utilities, travel and other expenses for timber sales and administrative costs among the nine endowments would be extremely costly and a tremendous administrative burden. The probable result would be a commingling of endowment monies in clear violation of the statutory requirement for strict accounting and reinvestment of the money upon the respective endowment lands. Such commingling would also violate the Idaho Constitution and Admissions Bill as more fully discussed later in this opinion.

The general expenses of the Department of Lands must be contrasted with the long-standing, accepted uses of the ten percent fund. Tree planting, pre-commercial thinning, reseeding, and similar practices intended to enhance yield all constitute a reinvestment upon the respective endowment land, to maintain and protect its market value and to enhance the income producing capacity of the land. The ten percent fund therefore was intended as a reinvestment through expenditures in the nature of capital improvements which would enhance the productivity of the land. Statement of Gordon Trombley, Director of the Department of Lands, and motion of Land Board, Official Land Board minutes, April 28, 1969. This conclusion was sustained in 1978 by Attorney General Opinion No. 78-28 which interpreted the purpose of the ten percent fund by examining the meaning of the language "protection of state-state-owned timberlands". The question in that opinion was whether the ten

percent fund could be appropriated in part for fire protection expenditures. The pertinent portion of that opinion stated:

Section 58-140 refers to the "protection of state-owned timberlands" but does not give the precise meaning of the phrase. Although the term "protection" would appear to include protection from forest fires, Gordon Trombley, Director of the Department of Lands for the past 11-1/2 years, maintains that the legislature did not intend that the "ten percent fund" be used for fire suppression costs. Mr. Trombley, closely involved with the drafting, legislative consideration, and enactment of §58-140, emphasizes that this section was intended to establish a fund to be used for projects which would enhance future production on state-owned timberlands or to rehabilitate the land. Hence, "protection" refers to management, reforestation, erosion control, etc., but does not include protection against forest fires.

The Idaho Supreme Court has declared that in construing statutes one should look not only to the literal wording of the statute but also to the context, the object in view, the evils to be remedied, the history of the times and of the legislation upon the same subject, public policy, contemporaneous construction, and other relevant matters. *Knight v. Employment Sec. Agency*, 88 Idaho 262, 398 P.2d 643 (1965). There is no formal legislative history available from which to ascertain the precise intent of Section 58-140, *Idaho Code*. As stated above, the meaning of the word "protection" within the statute is not clear. However, the Supreme Court has held that a continued and consistently practiced interpretation of an ambiguous statute by the enforcement official will be given weight by courts interpreting that statute. *State ex rel Haworth v. Berntsen*, 68 Idaho 539, 200 P.2d 1007 (1949). The Federal District Court of Idaho, in the case of *State of Idaho ex rel Andrus v. Kleppe*, 417 F. Supp. 873 (1976), has stated that an administrative interpretation of a statute is an important construction aid to identifying the legislative intent and is entitled to "considerable weight" where administrative interpretation is close in time to the passage of the statute and has endured the passage of time. Attorney General Opinion No. 78-28.

In view of the contemporaneous administrative interpretation, the express purpose stated by the legislature, and the actual language of §58-140, the purpose of the ten percent fund clearly is to maintain and protect the market value and to enhance the income producing capacity of endowment lands. The use of the ten percent fund for general operating expenses is inconsistent with such intent and purpose.

Nor can it be successfully argued that House Bill No. 443 impliedly repealed or amended *Idaho Code* §58-140 to authorize the use of the ten percent monies for general operating expenses. There is a strong presumption against the doctrine of repeal or amendment by implication, and it is said to apply with "full vigor" when the subsequent law is an appropriation measure. *Committee for Nuclear Responsibility v. Seaborg*, 463 F.2d 783 (D.C. Cir. 1971). To sustain an implied repeal, there must be a clear intention by the legislative body demonstrated by direct, specific, affirmative evidence in the subsequent bill and/or the legislative record. *United States v. Dickerson*, 310 U.S. 554, 60 Sup. Ct. 1034, 84 L.Ed. 1356; *Friends of the Earth v. Armstrong*, 485 F.2d 1 (10th Cir. 1973); *United States v. Langston*, 118 U.S. 389 6 Sup. Ct. 1185, 30

L.Ed. 164. An examination of House Bill No. 443 reveals only the appropriation from the ten percent fund for general administrative expenses and contains no indication, express or implied, of an intent to modify or repeal the existing language of *Idaho Code* §58-140. Even if the legislature had intended that House Bill No. 443 repeal or modify §58-140, the attempt would fail as contrary to the Idaho Constitution and the Admission Bill. Before examining the constitutionality of such expenditures, it is important to review the constitutional foundation for the ten percent fund.

In an opinion dated February 24, 1969, Attorney General Robert Robson concluded that *Idaho Code* §58-140 creating the ten percent fund, was consistent with both the Idaho Admissions Bill and the Idaho Constitution. In that opinion, the Attorney General opined that the use of the ten percent fund for reinvestment upon the same endowment lands from which the monies were derived with the strict accounting system required by the statute did not constitute a diversion or depletion of the public school fund. The public school fund consists of the permanent endowment fund, which is the principal of the trust, and the public school income fund. Monies in the permanent endowment fund are invested and the interest earned from these investments is placed in the public school income fund for the support of the public schools.

Timber sale proceeds accrue to the permanent endowment fund. Reinvesting ten percent of these proceeds on capital expenditures on the same endowment land enhances the income producing capacity of the land. A review of expenditures from the ten percent fund by the Department of Lands demonstrates an actual enhancement of market value of the lands, a verifiable increase in the revenues accruing to the permanent endowment fund, and a corresponding increase in the interest accruing to the public school income fund. Thus, the entire public school fund remains inviolate, intact and actually increased.

The converse effect, however, would result from expenditures of ten percent monies from timber sales for general operating expenses. The use of monies which would have been placed in the permanent endowment fund for expenses which do not increase the income producing capacity of endowment lands results in a depletion of the permanent endowment fund. In turn, less interest accrues to the public school income fund. Such expenditures would have the same effect as a direct transfer from the permanent endowment fund to the general fund causing depletion of the public school fund in violation of Article 9, §3 of the Idaho Constitution.

The Idaho Supreme Court has not considered the parameters of the ten percent fund but has ruled upon attempted expenditures of the public school fund for general operating expenses. In *Moon v. Investment Board*, 98 Idaho 200, 560 P.2d 871 (1979), the court in a per curiam opinion held unconstitutional an attempt by the Investment Board to transfer a portion of the earnings from the investment of public school funds to the Investment Board expense fund for the purpose of defraying expenses incurred by the Investment Board in the investment of the public school fund. The court stated:

It is our opinion that the legislation authorizing this practice, and the practice itself, is in violation of Article 9, §3 of the Constitution of the State of Idaho.

Article 9, §3 of the Idaho Constitution declares in part:

Section 3. Public school fund to remain intact. — The public school fund of the state shall forever remain inviolate and intact; the interest thereon only shall be expended in the maintenance of the schools of the state . . . No part of this fund, principal or interest, shall ever be transferred to any other fund, or used or appropriated except as herein provided.

. . . The same shall be securely and profitably invested as may be by law directed. The state shall supply all losses thereof that may in any manner occur.

This section of the Idaho Constitution was also the basis for a similar holding by the Idaho Supreme Court in the case of *Engelking v. Investment Board*, 93 Idaho 217, 458 P.2d 213 (1969). One of the issues in that case involved the validity of a senate bill providing for adjustments of net income and losses among the various permanent endowment funds. After quoting Article 9, §3, the court concluded:

To the extent that this language would require income of the public school fund to be distributed to other funds and losses of other funds to be distributed to the public school fund, and to the extent that such distributions might be made despite the first sentence of §11, we hold that the last sentence of §11 is unconstitutional as applied to the public school fund. We must give full effect to the terms of Idaho Constitution Article 9, §3, so that the fund will not in any manner be subject to depletion of principal or interest. In this regard, we follow the many cases involving this or similar funds which have protected them from any depletion. *United States v. Fenton*, 27 F. Supp. 816 (D.C. Idaho, 1939); *State v. Peterson*, 61 Idaho 50, 97 P.2d 603 (1939); *State v. Fitzpatrick*, 5 Idaho 499, 51 P. 112 (1897). *Engelking v. Investment Board*, 93 Idaho 15 224.

Although the questioned expenditure is different from the legislative proposal in the *Engelking* case, the result in both situations is similar to the extent of an unauthorized diversion and depletion of the public school fund. The Idaho Supreme Court has ruled that the public school fund constitutes a trust of the highest and most sacred order. *State v. Peterson*, *supra*. The court has emphasized that not one dollar of the public school fund may be diverted from the specific, lawful purposes delineated in the Admission Bill and the Idaho Constitution. *State v. Fitzpatrick*, *supra*.; *State v. Peterson*, *supra*. Nor can the public school trust be limited by any statute of limitations, for the phrase "forever remains inviolate and intact" means "forever". *United States v. Fenton*, *supra*.; *State v. Peterson*, *supra*.

The court in *Engelking*, *supra*, reiterated the rule against diversion and depletion of the public school fund and also upheld the constitutionally required strict and separate accounting for the individual endowment funds. In essence the court ruled that the potential commingling of the public school fund with other endowment funds was prohibited by Article 9, §3 of the Idaho Constitution. This rationale, in concert with the other strict precedents cited above, clearly precludes the use of the ten percent fund for general administrative costs with the resulting commingling among the various endowments. See page 4 of this opinion.

This analysis leads to the conclusion that the use of the ten percent fund for general operating expenditures would be contrary to Article 9, §3 of the Idaho Constitution. The last sentence of that section requires: "The state shall supply all losses thereof that may in any manner occur." Thus, the use of the ten percent fund for general expenses as proposed would not only be unconstitutional but would require the state to reimburse the public school fund in the amount depleted therefrom.

In summary, *Idaho Code* §58-140, creating the ten percent fund, was intended as a reinvestment of monies upon the same endowment lands from which they were derived for the purpose of capital improvements to maintain, protect, and enhance the income producing capacity of the respective lands. Use of the ten percent fund for general operating expenses of the Department of Lands would result in commingling of the various endowment funds and divert and deplete the permanent endowment fund for public schools. These results are contrary to the intent and purpose of the legislature in establishing the ten percent fund and in violation of the Idaho Constitution which requires the public school fund to remain inviolate and intact without diversion or depletion of any kind.

AUTHORITIES CONSIDERED:

1. *Idaho Constitution*, Article 9, §§3, 4.
2. *Idaho Admission Bill*, §4.
3. 1969 Idaho Sess. Laws, ch. 129, §1.
4. *Idaho Code* §58-140.
5. Attorney General Opinion No. 78-28; Opinion by Attorney General Robert Robson, dated February 24, 1969.
6. *Committee for Nuclear Responsibility v. Seaborg*, 463 F.2d 783 (D.C. Cir. 1971).
7. *United States v. Dickerson*, 310 U.S. 554, 60 Sup. Ct. 1034, 84 L.Ed. 1356.
8. *Friends of the Earth v. Armstrong*, 485 F.2d 1 (10th Cir. 1973).
9. *United States v. Langston*, 118 U.S. 389 6 Sup. Ct. 1185, 30 L.Ed. 164.
10. *Moon v. Investment Board*, 98 Idaho 200, 560 P.2d 871 (1979).
11. *Engelking v. Investment Board*, 93 Idaho 217, 458 P.2d 213 (1969).
12. *State v. Peterson*, 61 Idaho 50, 97 P.2d 603 (1939).
13. *State v. Fitzpatrick*, 5 Idaho 499, 51 P. 112 (1897).
14. *United States v. Fenton*, 27 F. Supp. 816 (D.C. Idaho).

DATED this 18th day of June, 1981.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

L. MARK RIDDOCH
Deputy Attorney General

cc: Idaho Supreme Court
Supreme Court Law Library
Idaho State Library

ATTORNEY GENERAL OPINION NO. 81-15

TO: Senator Majority Leader James E. Risch

Senate Minority Leader
Ron J. Twilegar

Senator James D. Auld

Representative Rachel S. Gilbert

Representative James D. Golder

Representative Dan D. Emery

Representative Gary L. Montgomery

Representative Christopher R. Hooper

Per Request for Attorney General Opinion

On June 9, 1981 this office received an inquiry from Representative Rachel Gilbert regarding the legal efficacy of the sale of 16 acres in downtown Boise by the Boise Redevelopment Agency to the Winmar Corporation. A subsequent request from Senator James Risch and Senator Ron Twilegar, and signed by Representative James Golder, Representative Dan Emery, Representative Christopher Hooper and Representative Gary Montgomery dated June 29, 1981 and signed by both the Senate Majority and Minority Leaders was also received. That second letter asked for detailed research on both legal and factual issues arising out of the sale of the Boise City Center site by the BRA to Winmar Development. Subsequent oral clarifications from legislative leadership stressed the importance to them of a formal written response being received early in a special legislative session called for July 7, 1981. As the majority of the issues relating to questions of bid competition and sale for less than fair value, acquiring current appraisal, discounted purchase price, conducting further hearings on urban renewal plan, and compliance with 30 day public notice requirements revolve in part around facts disputed in whole or in part, the resolution of those facts by field investigation, litigation or other

means is a necessary prerequisite to legal findings or conclusions. We reserve those topics for another day. To comply with the legislatively imposed timetable we answer only the threshold inquiries related to the Idaho Open Meeting Law.

QUESTIONS PRESENTED:

1. Did the Board of Commissioners of the Boise Redevelopment Agency violate any of the provisions of the Idaho Open Meeting Law when the Board reconvened to executive session during its regular monthly meeting held Tuesday, June 2, 1981?

2. What are the consequences of a violation of the Idaho Open Meeting Law?

CONCLUSIONS:

1. Our review of the recorded minutes of the June 2, 1981, regular meeting of the Board of Commissioners of the Boise Redevelopment Agency indicates the Board violated the Idaho Open Meeting Law, specifically *Idaho Code* §67-2345, in effecting the executive session it held during the course of that meeting.

2. *Idaho Code* §67-2347, prescribes that any action taken at any meeting which fails to comply with the provisions of the Idaho Open Meeting Law shall be null and void. Therefore that action taken during the course of the regular meeting of the Board of Directors of the Boise Redevelopment Agency held June 2, 1981, is null and void.

ANALYSIS:

The Idaho Open Meeting Law was enacted in 1974. Since that time the legislature has reviewed and, on occasion, modified that law. In each instance the legislature has reaffirmed its intent, that absent express exceptions, public policy shall not be constructed in secret. Our duty is to interpret this law as it is written and, if possible, do so in a manner to prevent its circumvention.

The Idaho Open Meeting law is contained in *Idaho Code* §§67-2340 through 67-2346.

Idaho Code §67-2340, expressly declares that it is the policy of this state that the formation of public policy is public business and shall not be conducted in secret.

Idaho Code §67-2341(3), defines a "public agency" as any state board . . . which is created by or pursuant to statute.

Idaho Code §67-2341(5), defines a "meeting" as the convening of a governing body of a public agency to make a decision or to deliberate toward a decision on any matter.

Idaho Code §67-2341(5)(a) defines a "regular meeting" as the convening of a governing body of a public agency on the date fixed by law or rule to conduct the business of the agency.

The Boise Redevelopment Agency (BRA) was created pursuant to the Idaho Urban Renewal Law of 1965, *Idaho Code* §§50-2001 et seq.

Chapter 20, Title 50, *Idaho Code*, Idaho Urban Renewal Law of 1965, provides the authority under which local governments may acquire, clear, and dispose of “deteriorated and deteriorating areas which constitute a serious or growing menace injurious to the public health, safety, morals and welfare of the residents of the state”, subject to the restrictions contained in the Act. *Idaho Code* §50-2003 requires that the urban renewal agency must, to the greatest extent possible, afford the maximum opportunity for redevelopment by private enterprise.

The procedures whereby the city may implement the law begins with the development of a workable program as required by §50-2004. The program may include, but is not limited to, enforcement of housing, zoning and occupancy controls and standards to prevent the spread of blight, the rehabilitation or conversion of slums and blighted areas, and cooperating with an Urban Renewal Agency for the clearance and redevelopment of deteriorated areas. Section 50-2005 requires a finding of necessity by a local governing body before either it or the urban renewal agency may begin any redevelopment work.

Idaho Code §50-2006 creates in each municipality an independent public body corporate politic to be known as “the Urban Renewal Agency” for the municipality. That section further describes the appointment of the Board of Commissioners of the urban renewal agency by the local governing body. *Idaho Code* §50-2006(2) allows the local governing body to appoint itself as the Board of Commissioners of the Urban Renewal Agency. *Idaho Code* §50-2006(3) provides that the local governing body may terminate that appointed Board of Commissioners by the enactment of an ordinance and thereby appoint itself as the Board of Commissioners. In the case of the BRA the Boise City Council did this several years ago and now sits as the Board of Commissioners of the Boise Redevelopment Agency.

Idaho Code §50-2007 describes the powers of the Urban Renewal Agency; §50-2008 discusses the preparation and approval of a plan for the urban renewal project; §50-2009 discusses neighborhood and community wide plans; §50-2010 discusses the acquisition of property; §50-2011 discusses the disposal of property in the urban renewal area; §50-2012 through §50-2017 discuss the issuance of bonds; tax exemptions, cooperation with other public bodies, title given to purchasers and the interests of public officials and their employees. Finally §50-2018 contains the definitions of the terms used in the act.

Records made available to us by the BRA, including a tape recording of the session reflect that the monthly meeting of the Board of Directors of the Boise Redevelopment Agency was held Tuesday, June 2, 1981, in the Ada County Hearing Room, Third Floor, County Administration Building, 650 Main Street, Boise, Idaho, and that Chairman Ralph J. McAdams called the meeting to order at 12:25 p.m.

During the course of the meeting, and after a call to BRA Special Legal Counsel Mr. Joseph E. Coomes, Jr., for questions from the Board, by the following procedure the Board went into executive session:

CHAIRMAN McADAMS:

Seems to me since we are dealing with the question of real estate it might be in order for us to go into executive session to talk to our local and out of town counsel and come back into public meeting right after we have done that.

DIRECTOR SELANDER:

Mr. Chairman, I move that we, for the purpose of discussing the possibility of transfer of land, move into executive session.

MR. ANDERSON:

Second.

CHAIRMAN McADAMS:

Is there discussion of the motion?

CHAIRMAN McADAMS:

All in favor say aye.

BOARD MEMBERS: Aye (unanimously).

CHAIRMAN McADAMS:

We are going into this executive session. Mr. Mayor, may we use your office?

The Idaho Legislature has authorized "executive sessions" only when conducted pursuant to *Idaho Code* §67-2345.

Idaho Code §67-2345(1) provides:

Nothing contained in this act shall be construed to prevent, upon a two-thirds (2/3) vote recorded in the minutes of the meeting by individual vote, a governing body of a public agency from holding an executive session during any meeting, after the presiding officer has identified the authorization under this act for the holding of such executive session. An executive session may be held:

(a) To consider hiring a public officer, employee, staff member or individual agent. This paragraph does not apply to filling a vacancy in an elective office;

(b) To consider the evaluation, dismissal or disciplining of, or to hear complaints or charges brought against, a public officer, employee, staff member or individual agent, or public school student;

(c) To conduct deliberations concerning labor negotiations or to acquire an interest in *real property which is not owned by a public agency*;

- (d) To consider records that are exempt by law from public inspection;
- (e) To consider preliminary negotiations involving matters of trade or commerce in which the governing body is in competition with governing bodies in other states or nations.
- (f) To consider and advise its *legal representatives in pending litigation or where there is a general public awareness of probable litigation.* (Emphasis added).

The relevant minutes of the June 2, 1981, regular meeting of the BRA evidences four insufficiencies.

First, we find an absence of authorization under the Open Meeting Law for conducting an executive session for the purpose of acquiring interest in real property owned by a public agency. (*Idaho Code* §67-2345 (1) (c)). Second, the failure of the BRA Board Chairman, as presiding officer, to articulate other identifiable authorization for holding an executive session is apparent. (*Idaho Code* §67-2345 (1) (f)). Third, the failure to call for an individual vote on whether to hold an executive session. Fourth, omitting to record in the minutes of the meeting that individual vote.

In our opinion these insufficiencies are not *de minimus* but substantive. The open meeting law is intended to prevent private meetings of governmental commissions in which only the final result is observed by the public at an open meeting, all important discussions and arguments having taken place behind closed doors. In the instant case, the legislature has prescribed limited exceptions to its open meeting policy. To those present at the June 2, 1981, BRA meeting, their only knowledge of the events of the meeting was that which they observed. The commissioners did not clearly, adequately or lawfully inform the public of a legislatively approved justification for holding an "executive session".

The absence of that notification is fatal when *Idaho Code* §67-2347 prescribes the penalty for violation of the Idaho Open Meeting Law in that:

Any action taken at any meeting which fails to comply with the provisions of *Idaho Code* §67-2340 through §67-2346 shall be null and void.

Clearly, any action taken at this executive session is void. Where the commissioners reconvene from executive session and proceed to take final action without recreating or correctly explaining or justifying the executive session and where the subjects discussed and acted upon in that later open session are fundamentally and inextricably related to those of the unauthorized executive session we predict our courts if presented with the question would void all related actions at all portions of the meeting. In our opinion to hold otherwise would be to ignore the policy of our legislature and the existence of the Idaho Open Meeting Law.

AUTHORITIES CONSIDERED:

1. *Idaho Code* §67-2340.
2. *Idaho Code* §67-2341.

3. *Idaho Code* §67-2342.
4. *Idaho Code* §67-2344.
5. *Idaho Code* §67-2345.
6. *Idaho Code* §67-2346.
7. *Idaho Code* §67-2347.
8. *Idaho Code* §50-2001, et seq.

DATED this 10th day of July, 1981.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

JOHN ERIC SUTTON
Deputy Attorney General
Chief, State Finance Division

cc: Idaho Supreme Court
Idaho Supreme Court Law Library
Idaho State Library

ATTORNEY GENERAL OPINION NO. 81-16

TO: Jerry M. Conley, Director
Idaho Department of Fish and Game
Statehouse Mail

QUESTIONS PRESENTED:

1. Does the Department of Fish and Game, as an administrative department of the State of Idaho, have the authority to concede jurisdiction over non-Indian fee lands lying within the boundaries of the Fort Hall Indian Reservation to the Shoshone-Bannock Tribe?
2. Can the Department of Fish and Game require non-Indian landowners and hunters to purchase Shoshone-Bannock tribal hunting permits as a prerequisite to hunting on non-Indian fee lands within the boundaries of the Fort Hall Indian Reservation?

CONCLUSIONS:

1. An administrative agency has only those powers which are specifically granted or necessarily implied. The powers granted to the Department of Fish and Game in Title 36, *Idaho Code*, contain no grant of authority to formally recognize tribal sovereignty over non-Indian lands. That power may only be exercised by the Congress.

2. Pursuant to the holding of the U.S. Supreme Court in *Montana v. United States*, the tribe has no jurisdiction over non-Indian fee lands lying within the boundaries of the Fort Hall Indian Reservation for the purposes of fish and game management. Even if it did, the Department of Fish and Game could not require the purchase of tribal hunting permits since to do so would be in direct contravention of *Idaho Code* §36-104 (c).

ANALYSIS:

Your first question asks whether the Idaho Department of Fish and Game has the authority to concede jurisdiction over non-Indian fee lands lying within the boundaries of the Fort Hall Indian Reservation to the Shoshone-Bannock Tribe.

The power of the state legislature to create and act through administrative agencies is undoubted. 1 Am. Jur. 2d *Administrative Law* §23, p.827. However, since the agency is a creature of the legislature its powers are circumscribed by the specific grant of authority provided to it, the legislature thereby retaining the residual authority not granted. As stated in the case of *Ferdig v. State Personnel Board*, 71 Cal. 2d 96, 453 P.2d 728, 732, 77 Cal. Rptr. 224 (1969),

It is settled principle that administrative agencies have only such powers as have been conferred on them, expressly or by implication, by constitution or statute. (cites omitted) An administrative agency, therefore, must act within the powers conferred upon it by law and may not validly act in excess of such powers.

See also, *Arrow-Hart & H. Elec. Co. v. Federal Trade Commission*, 291 U.S. 587, 598, 78 L.Ed. 1007, 1013 (1934); *Cole v. Washington Utilities and Transportation Commission*, 79 Wash. 2d 302, 485 P.2d 71 (1971); *City of Polson v. Public Service Commission*, 155 Mont. 464, 473 P.2d 508 (1970), 1 Am. Jur. 2d *Administrative Law* §73, p.868.

The statutes dealing specifically with fish and game are found in Title 36, *Idaho Code*. The twenty-two chapters contained therein deal with diverse matters from issuance and sale of licenses (Chapter 3) to outfitters and guides (Chapter 21). With the exception of Chapter 1, all the chapters deal with specific matters, none of which is relative to sovereignty.

Chapter 1, Title 36 deals with the Fish and Game Commission, its makeup and its general authority. Section 36-104, entitled "General powers and duties of commission" delineates the department's powers to carry out the requirements of Title 36. It provides for the organization of the commission, and authorizes it to investigate wildlife, hold hearings, declare emergency closures, open game preserves to hunting, set controlled hunts, promulgate rules for import and export of wildlife, acquire lands on behalf of the state, control undesirable species and to organize the department pursuant to law. It also provides for cooperative agreements between the department and other agencies or persons for the purposes of wildlife management, research, protection and so on.

Sections 36-104 (b) (8) and (b) (9) are the only ones in title 36 which could be considered to be even remotely related to jurisdiction. However, they merely provide authority for entering into cooperative agreements for specific enumerated purposes: "to promote wildlife research and to train students for wildlife

management . . .” and “for the development of wildlife rearing, propagating, management, protection and demonstration projects.” None of these could be construed as a grant of authority to concede complete and expansive jurisdiction over lands for regulatory purposes.

A careful examination of the statutes reveals no grant of authority to the Department of Fish and Game which would enable it to formally concede jurisdiction over nonmember fee lands lying within the boundaries of the Fort Hall Indian Reservation to the Shoshone-Bannock Tribe.

Furthermore, as a general rule of law, the authority to expand or diminish the territorial jurisdiction of an Indian tribe rests solely with the Congress by virtue of its sovereign power over Indians. *Washington v. Confederated Tribes of Colville Indian Reservation*, ____ U.S. ____, 65 L.Ed. 2d 10, 29, 100 S. Ct. 2069 (1980); *United States v. Kagama*, 118 U.S. 375, 30 L.Ed. 228, 231, 6 S. Ct. 1109 (1886); *Worcester v. Georgia*, 6 Pet. (U.S.) 515, 557, 8 L.Ed. 483, 500 (1832).

In light of the foregoing, it is our opinion that the Department of Fish and Game is not empowered to concede jurisdiction of nonmember fee lands within the Fort Hall Reservation to the Shoshone-Bannock Tribe.

Your second question asks whether the Department of Fish and Game may require nonmember owners of fee lands and other nonmember hunters to secure tribal hunting permits before they can hunt on fee lands within an Indian reservation.

The fee lands you ask about are those which lie within the boundaries of an Indian reservation but are owned in fee by non-Indians and/or nonmembers of the tribe. Your question assumes that the tribe has jurisdiction over these lands since they are within the reservation.

A similar situation existed in the recent case of *Montana v. United States*, ____ U.S. ____, 67 L.Ed. 2d 493, 101 S. Ct. ____ (1981), with regard to the Crow Indian Reservation in Montana. There, the tribe sought to prohibit hunting and fishing within the boundaries of the reservation by anyone who was not a member of the tribe. This prohibition was even to be levied against those nonmembers who owned lands in fee within the reservation.

The Supreme Court held that while the tribe could prohibit or regulate hunting and fishing by nonmembers on lands belonging to the tribe or held in trust for them by the United States, that authority did not extend to nonmembers of the tribe on fee lands lying within the reservation.

Relying upon its earlier decision in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 55 L.Ed. 2d 209, 98 S. Ct. 1011, the Court said:

Though *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that *inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the Tribe*. *Montana v. United States*, *supra* at 510 (Emphasis added).

The Court went on to say that while there may be some instances where the tribe would have jurisdiction over nonmembers upon the reservation, particularly in the area of consensual relationships such as contracts, or where the

nonmember conduct might seriously threaten the health and welfare of the tribe, those circumstances are not involved with hunting and fishing by nonmembers on fee lands. Therefore, if the tribe lacks jurisdiction over fee patented lands within the reservation, and has no power to regulate nonmember hunting and fishing on those lands, there is no need for nonmembers to secure tribal permits to hunt or fish on those lands.

However, even if the tribe had such authority, the Department of Fish and Game could not require the purchase of tribal permits.

As previously discussed, an administrative agency has only those powers which are specifically granted or necessarily implied. The legislature may also specifically limit the powers of an agency. Such limitation on the powers of the Fish and Game Commission are expressed in *Idaho Code* §36-104 (c) which says:

(c) Limitation on Powers. Nothing in this title shall be construed to authorize the commission to change any penalty prescribed by law for a violation of its provisions, or to change the amount of license fees or the authority conferred by licenses prescribed by law.

By requiring hunters to purchase a tribal permit to hunt on non-Indian fee lands within an Indian reservation, the commission would be changing the amount of license fees and/or the authority conferred by Idaho licenses prescribed and set by other statutes. This action would be contrary to Section §36-104 (c), *Idaho Code*. Clearly, any authorization or expansion of authority conferred by a license must be granted by the legislature, not the department. We are therefore of the opinion that the Department of Fish and Game is precluded from requiring non-Indian landowners and hunters to purchase tribal hunting permits.

AUTHORITIES CONSIDERED:

1. *Idaho Code*, Title 36.
2. *Arrow-Hart & H. Elec. Co. v. Federal Trade Commission*, 291 U.S. 587, 598, 78 L.Ed. 1007, 1013 (1934).
3. *City of Polson v. Public Service Commission*, 155 Mont. 464, 473 P.2d 508 (1970).
4. *Cole v. Washington Utilities and Transportation Commission*, 79 Wash. 2d 302, 485 P.2d 71, (1971).
5. *Ferdig v. State Personnel Board*, 71 Cal. 2d 96, 453 P.2d 728, 732, 733, 77 Cal. Rptr. 224 (1969).
6. *Montana v. United States*, ____ U.S. ____, 67 L.Ed. 2d 493, 101 S. Ct. ____ (1981).
7. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 55 L.Ed. 2d 209, 98 S. Ct. 1011.
8. *United States v. Kagama*, 118 U.S. 375, 30 L.Ed. 228, 231, 6 S. Ct. 1109 (1886).

9. *Washington v. Confederated Tribes of Colville Indian Reservation*,
____ U.S. ____, 65 L.Ed. 2d 10, 29, 100 S. Ct. 2069 (1980).
10. *Worcester v. Georgia*, 6 Pet. (U.S.) 515, 557, 8 L.Ed. 483, 500 (1832).
11. 1 Am. Jur. 2d *Administrative Law* §23, p.827.
12. 1 Am. Jur. 2d *Administrative Law* §73, p. 868.

DATED this 24th day of August 1981.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

RGR/tl

ANALYSIS BY:

ROBIE G. RUSSELL
Deputy Attorney General
Chief, Local Government Division
Chairman, Indian Law Task Force

cc: Idaho Supreme Court
Idaho Supreme Court Law Library
Idaho State Library

ATTORNEY GENERAL OPINION NO. 81-17

TO: Mr. Warren Waite, Administrator
Division of Support Services
Department of Health and Welfare

Mr. Bruce Balderston
Legislative Auditor

Per Request for Attorney General Opinion

QUESTIONS PRESENTED:

1. Under what circumstances may an employee of the state of Idaho be compensated with more than forty (40) hours of pay if the employee has not worked forty (40) hours during the work week?
2. What alternatives exist for controlling or compensating an employee who may earn more than forty (40) hours of compensation in a given work week?

CONCLUSIONS:

1. There are numerous circumstances where an employee may be owed more than forty (40) hours of compensation for a week during which he or she has not

worked forty (40) hours. Generally speaking, the excess compensation is owed where any combination of hours worked and approved leave time exceeds forty (40) hours.

2. An appointing authority has several possible ways of dealing with the situation including, at the least, payment in cash, forbidding the accumulation of hours over forty (40) hours, or allowing the employees to take administrative leave with pay under the guidelines which could be established by the Idaho Personnel Commission.

ANALYSIS:

The analysis offered here necessarily entails the interpretation of the various statutes which apply to the bulk of the state's employees: the classified work force. For those exempt employees who are treated "to the extent possible . . . comparable to classified employees" (§59-1603, *Idaho Code*), the analysis regarding compensation would be the same. This distinction is made because of the dearth of legislative guidance regarding exempt employees and the detailed, comprehensive framework created for classified employees.

In either structure, any determination will be governed by the state's statutes and regulations. The state is not subject to the Fair Labor Standards Act (29 U.S.C. §201 et. seq.), or its terms, definitions or concepts (*National League of Cities v. Usery*, 426 U.S. 833 [1976]). Rather, the state is a creator and controller of its personnel relationships with its employees: "The ultimate control of state personnel relationships is, and will, remain with the states; they may grant or withhold tenure at their unfettered discretion." *Bishop v. Wood*, 426 U.S. 341 (1976).

The Idaho Personnel Commission act found in title 67, chapter 53, *Idaho Code*, creates and grants the authority to compensate the classified work force of the state. The *Idaho Code* sets out the threshold questions of determining what a given job does (§67-5309 [a], *Idaho Code*) and how much it should be paid (§67-5309 [b] and §67-5309B, *Idaho Code*). The *Code* then establishes a series of reference points regarding employment, but does not specifically answer the questions presented. In §67-5332, *Idaho Code*, the concept of credited state service is established. Credited state service is a time keeping device which measures the hours an employee is performing his or her duties or is on approved leave with pay. The approved leave with pay statutes (§§67-5333, -5334, -5335, -5302[12], *Idaho Code*) mandate a detailed record keeping system which must be strictly and consistently applied. Finally, the state policy regarding overtime dictates how and under what circumstances compensation may be made. (§§67-5326, -5328, -5329, -5330, *Idaho Code*).

From the above, it appears the Idaho Legislature has enacted a fairly comprehensive scheme for recording of the time an employee works or is on approved leave. Compensation is given to an employee only for having worked or having been on an approved leave with pay. Records for these purposes must be accurately maintained. The result of the statutory scheme is a number of instances where an employee is owed more than forty (40) hours compensation during a work week where he or she works less than forty (40) hours. For purposes of illustration, the following format will be used to show some of the circumstances where an employee may earn more than forty (40) hours of compensation. This employee's normal work week as regularly scheduled is Monday through Friday with Saturdays and Sundays off.

The first example shows what happens during a week with a typical Monday holiday and the employee works a full forty (40) hour week:

SATURDAY	SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY
		8 hrs.	10 hrs.	10 hrs.	10 hrs.	10 hrs.
Off	Off	Holiday	Worked	Worked	Worked	Worked
Hours actually worked				- 40		
Other time (holiday)				- 8		
TOTAL COMPENSATION OWED				- 48		

The second example shows what would happen to the same employee, during the same week, if she were sick Wednesday and worked extra on Thursday to make up for the illness.

SATURDAY	SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY
		8 hrs.	8 hrs.	8 hrs.	10 hrs.	8 hrs.
Off	Off	Holiday	Worked	Sick Lv.	Worked	Worked
Hours actually worked				- 26		
Other time (holiday)				- 8		
(sick leave)				- 8		
TOTAL COMPENSATION OWED				- 42		

The third example of the same week may occur where an employee goes on vacation on Friday and works extra to get ready for it.

SATURDAY	SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY
		8 hrs.	8 hrs.	8 hrs.	10 hrs.	8 hrs.
Off	Off	Holiday	Worked	Worked	Worked	Vacation
Hours actually worked				- 26		
Other time (vacation)				- 8		
(holiday)				- 8		
TOTAL COMPENSATION OWED				- 42		

In each of the examples, the hours where an employee actually performed duties are forty (40) or less, while the total compensation owed is greater than forty (40) because the statutory scheme provides compensation for hours worked and for approved leaves.

Thus, the circumstances where the state owes an employee compensation for more than forty (40) hours may occur in any week in which the employee uses any of the approved leaves such as holidays, sick or vacation leave, or compensatory time off. Note, however, that these hours in excess of forty (40) do not incur an overtime obligation because the employee has not worked more than forty (40) hours during the week.

It has been suggested that it was the Idaho Legislature's intent not to pay an employee for any hours in excess of forty (40) hours. While the Legislature has defined "normal work week" as forty (40) hours worked in a week (§67-5302[14],

Idaho Code), there is nothing to support a contention that it was the Legislature's intent to restrict pay to only forty (40) hours in a given week. Indeed, to derive such an interpretation would violate one of the fundamental principles of statutory construction: The plain, obvious and rational meaning is always preferred to any hidden, narrow, or irrational meaning. See *Higginson v. Westergard*, 100 Id. 687, 604 P.2d 51, (1979); *Nagel v. Hammond*, 90 Id. 96, 408 P.2d 468 (1965). As the above analysis plainly shows, there are numerous circumstances where compensation can exceed forty (40) hours in a week and that there are no prohibitions to the payment of all hours owed to the employee.

Another approach to obtain the result of the forty (40) hour week could be to "adjust" the leave and work hour balances. Using the third example above to obtain the forty (40) hour result, the vacation balance could be adjusted to show only six (6) hours of vacation pay and, therefore, a forty (40) week. Such an adjustment would, obviously, violate the mandate to strictly record the accrual and use of vacation leave time for vacation purposes. No authority for such a method of time keeping and "adjustment" exists in the statutory framework.

Having established that an employee may be owed more than forty (40) hours of compensation in a given week, we must recognize the potential for the fiscal strain this obligation may impose on an appointing authority's budget. Several alternatives are available to the various appointing authorities in dealing with compensation problems. Appointing authorities have been granted broad powers to control their employees and the conduct of the agency's business in §67-2405, *Idaho Code*. Appointing authorities may well find other ways of dealing with the problem under the broad powers granted to them in that section of the *Code* for conducting the agency's business.

The first alternative would be for the appointing authority to pay the employee cash for all hours of compensation owed. While this approach is the easiest to execute, it has the potential for creating the greatest fiscal strain on the department's budget. A decision to pay strictly cash compensation for all hours owed should be approached carefully.

Another alternative would be for an appointing authority to exercise the power given them, in §67-2405, *Idaho Code*, to schedule and distribute the work of their department. The fiscal consequences of paying cash for hours in excess of forty (40) would be avoided where appointing authorities would not permit the excess hours to be accumulated. In the first example, the excess hours problem could be avoided by not allowing employees to work 10 hours per day during weeks with Monday or Friday holidays. Similarly, in the second and third examples, the appointing authority or supervisor might not authorize the employee to work the 10 hour day on Thursday.

Additionally, appointing authorities are given the general power, within the confines of the state's merit system, to "change the . . . compensation of employees in the department." (§67-2405[9], *Idaho Code*). Most departments are also specifically given the power, as modified by merit system structures, to fix the compensation of their employees. See e.g., §63-510, *Idaho Code*, (Revenue and Taxation); §67-4222(c), *Idaho Code*, (Parks); §61-206, *Idaho Code*, (Public Utilities Commission); §58-108, *Idaho Code*, (Lands). For fiscal reasons, an appointing authority could restrict cash compensation payable in a given week to a maximum of forty (40) hours, so long as the obligation to compensate for the excess hours is fulfilled and mandatory leave balances are accurately maintained. In this opinion, the word "compensation" has been used to describe the recompense

provided to state employees. This differentiation is made to separate cash compensation and another form of compensation recognized in the *Idaho Code*. The current legislative scheme mandates overtime be compensated (§67-5326, *Idaho Code*) but makes two types of compensation available: cash or compensatory time off (§67-5328, *Idaho Code*).

The rules of the Idaho Personnel Commission also recognize the distinction by providing for administrative leave with pay: "At the discretion of the appointing authority, an employee may be granted administrative leave with pay when the state will benefit as a result of the leave." (I.P.C. Rule 25.D.1) In the situations discussed in this opinion, the benefit to the state would be the relief of the fiscal strain on the department's budget to compensate the employees with cash in every instance. The employee would also receive a benefit (paid time off from work) which does not damage the statutory structure of work and leave time.

The Commission may issue guidelines for earning and using administrative leave in the types of situations outlined. As noted earlier, appointing authorities who treat exempt employees like classified employees could develop a similar system.

An appointing authority may be faced with any number of circumstances where an employee is owed more than forty (40) of hours compensation even though the employee has not worked over forty (40) hours. In order to avoid the budgetary and fiscal consequences of this situation, the problem should be recognized. Any one of the three alternatives, or any other legal approach, may be used to mitigate or control the obligation to compensate the employee fully for the hours worked and approved leaves.

AUTHORITIES CONSIDERED:

1. United States Code Provisions: 29 U.S.C. 201, et. seq.
2. *Idaho Code* Provisions: §58-108, §59-1603, §61-206, §63-510, §67-2405, §67-4222(c), §67-5302, -5309, -5309B, -5326, -5328, -5329, -5330, -5332, -5333, -5334, -5335.
3. United States Cases:
Bishop v. Wood, 426 U.S. 341 (1976)
National League of Cities v. Usery, 426 U.S. 833 (1976).
4. Idaho Cases:
Higginson v. Westergard, 100 Id. 687, 604 P.2d 51 (1979)
Nagel v. Brown, 90 Id. 96, 408 P.2d 468 (1965).
5. Rules: Idaho Personnel Commission, IDAPA 28.25.

DATED this 18th day of December, 1981.

ATTORNEY GENERAL
State of Idaho
/s/DAVID H. LEROY

DHL/WBL/ct

ANALYSIS BY:

WILLIAM B. LATTA, JR.
Deputy Attorney General
Idaho Personnel Commission

cc: Idaho State Library
Idaho Supreme Court
Idaho Supreme Court Library

ATTORNEY GENERAL OPINION NO. 81-18

TO: John R. Douglas, Esq.
Prosecuting Attorney
County of Boundary
Post Office Box 368
Bonners Ferry, Idaho 83805

Per Request for Attorney General Opinion

QUESTION PRESENTED:

Whether cities and counties must exercise the powers and duties conferred by the Local Planning Act of 1975, §§67-6501, et seq., *Idaho Code*, including the adoption of zoning ordinances.

CONCLUSION:

The language of the Local Planning Act is mandatory and requires compliance with its provisions by all units of local government. One of those provisions, §67-6511, requires the adoption of zoning ordinances.

ANALYSIS:

You have asked whether a county must have a zoning ordinance or whether the county may decide not to zone at all. Your question brings forth a larger issue and that is whether local governments must comply with the requirements of the Local Planning Act of 1975, *Idaho Code* §§67-6501, et. seq. (hereinafter "the Act").

While this office has issued numerous informal guidelines, letters, and several opinions regarding the requirements of the Act, we have never directly addressed in official opinion form the question of whether the Act is mandatory and hence must be complied with by all local government entities. In response to your request and numerous other inquiries by public officials and citizens we issue this opinion.

The Local Planning Act was adopted by the Legislature in 1975. It repealed all former statutes which dealt with planning and zoning and replaced them with a comprehensive act that attempts to cover all aspects of the process.

The Act contains a mixture of mandatory and permissive language. While some sections are replete with "may provide," "may include," and "may define,"

other sections are written in compulsory language: "shall," "must," and the like. The choice of language in the Act indicates that while certain provisions are mandatory, others allow a great amount of latitude to local governments.

A reading of the opening provisions of the Act clearly indicates that compliance with its basic provisions is mandatory. Section 67-6503 says:

Every city and county *shall* exercise the powers conferred by this chapter.[Emphasis added].

The word "shall," when used in statutes, is considered to be mandatory, not discretionary. *Goff v. H.J.H. Co.*, 95 Idaho 837, 421 P.2d 661 (1974); 73 Am. Jur.2d, *Statutes*, §22 (1974).

The Idaho Supreme Court has had occasion to interpret the language contained in the Local Planning Act in the case of *Dawson Enterprises, Inc. v. Blaine County*, 98 Idaho 506, 511, 567 P.2d 1257 (1977). There, the Court considered the language of §67-6508, entitled "Planning duties," which states that:

It *shall* be the duty of the planning or planning and zoning commission to conduct a comprehensive planning process . . . [Emphasis added].

The Court held that the Act would *require* the adoption of a comprehensive plan as a condition precedent to the validity of any zoning ordinance.

It logically follows that if the compulsory language in one section of the Act is mandatory, other compulsory language in the Act is also mandatory. The Idaho Supreme Court has said:

Other portions of the same act or section may be resorted to as an aid to determine the sense in which a word, phrase or clause is used, and such phrase, word or clause, repeatedly used in a statute will be presumed to bear the same meaning throughout the statute . . .

Kerley v. Wetherell, 61 Idaho 31, 41, 96 P.2d 503 (1940); *see also Sprouse v. McGee*, 46 Idaho 622, 269 P.993 (1928).

Section 67-6511 of the Act, entitled "Zoning ordinance," says that:

Each governing board *shall*, by ordinance adopted, amended, or repealed in accordance with the notice and hearing procedures provided under section 67-6509, *Idaho Code*, establish within its jurisdiction one (1) or more zones or zoning districts where appropriate. The zoning districts shall be in accordance with the adopted plan. [Emphasis added].

The effect of the foregoing language is self-evident. While the local governing body may repeal its present zoning ordinances, it must adopt new ones in their place in order to be in compliance with the requirements of the Act.

The Local Planning Act, although mandatory, contains no penalties for non-compliance by local governments nor does it provide any mechanism for compelling creation and adoption of plans and ordinances. However, equitable remedies provide a means of compelling public officials to act by way of a Writ of Mandamus. Additionally, criminal penalties may attach if the failure to act is found to be an "omission" or "neglect" of a public duty. Such an offense is a misdemeanor. See, for example, §§18-315, et seq., *Idaho Code*.

It may be argued that the absence of any enforcement provisions in the Act manifests specific intent by the legislature to make the Act non-mandatory and unenforceable. Such a contention is without merit. Repealer bills introduced in the last session of the Legislature did not become law. That action manifests legislative intent to keep the Local Planning Act in force.

Finally, there has been widespread acceptance of the Act. As of this date, 40 of Idaho's 44 counties have adopted or are in the process of adopting comprehensive plans. Of Idaho's 199 cities, 125 have or are adopting comprehensive plans. The majority of the cities without plans are the sparsely populated small towns which do not suffer the development pressures and competing uses which require some form of zoning.

In summary, it is our opinion that the statutory language currently in force requires every local government in Idaho to follow the dictates of the Local Planning Act of 1975. In so doing, each governing body must have a separate comprehensive plan and at least one zoning ordinance in effect. While the governing board may repeal the plan or ordinances if it so desires, it must adopt new ones to take their place.

AUTHORITIES CONSIDERED:

1. Local Planning Act, *Idaho Code* §§67-6501, et seq.
2. Sections 18-315, et seq. *Idaho Code*.
3. *Dawson Enterprises, Inc. v. Blaine County*, 98 Idaho 506, 511, 567 P.2d 1257 (1977).
4. *Goff v. H.J.H. Co.*, 95 Idaho 837, 421 P.2d 661 (1974).
5. *Kerley v. Wetherell*, 61 Idaho 31, 41, 96 P.2d 503 (1940).
6. *Sprouse v. McGee*, 46 Idaho 622, 269 P. 993 (1928).
7. 73 Am. Jur. 2d *Statutes*, §22 (1974).

DATED this 31st day of December, 1981.

ATTORNEY GENERAL
State of Idaho
/s/DAVID H. LEROY

RGR/tl

ANALYSIS BY:

ROBIE G. RUSSELL
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cc: Idaho Supreme Court
Idaho Supreme Court Law Library
Idaho State Library

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**ATTORNEY GENERAL'S
SELECTED LEGAL GUIDELINES
FOR THE YEAR 1981**



David H. Leroy
Attorney General

January 20, 1981

Ray E. Infanger
Representative District 20
Statehouse
Boise, Idaho 83720

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION,
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Dear Ray:

By letter dated January 19, 1981, you asked the following questions:

1. Does underground or lode mining constitute surface mining under the Surface Mining Act, Title 47, Chapter 15, *Idaho Code*?
2. Is disturbance of the surface from exploration, prior to potential hard rock subsurface mining, regulated by the Surface Mining Act?

Idaho Code Section 47-1503(5), defines "surface mining operations" to include activities performed on a surface mine in the extraction of minerals from the ground. By specifically referencing surface mine in that definition Section 47-1503(5) incorporates the definition of surface mine in Section 47-1503(7). "Surface mine" is defined as an area where minerals are extracted by removing the overburden lying above and adjacent to natural deposits thereof and mining directly from the natural deposits thereby exposed. Therefore, since underground mining is not a process whereby minerals are extracted directly from the natural deposits thereby exposed, underground mining does not constitute surface mining. However, if a lode deposit is mined from the surface, as opposed to subsurface, it would constitute surface mining under the Act. Since your question appears to refer specifically to underground lode mining, it is my opinion that that type of mining would not constitute surface mining and therefore, would not be regulated by the requirements of the Surface Mining Act.

In response to your second question, it is my opinion that exploration prior to potential hard rock subsurface mining is regulated by the Surface Mining Act. *Idaho Code* Section 47-1501, states that:

It is the purpose of this Act to provide for the protection of the public health, safety and welfare, through measures to reclaim the surface of all the land within the State disturbed by exploration and surface mining operations and thereby conserve natural resources, aid in the protection of wildlife, domestic animals, aquatic resources, and reduce soil erosion.

Therefore, the purpose of the Surface Mining Act is to reclaim lands disturbed by both exploration and surface mining operations. *Idaho Code* Section 47-1501 clearly references the definition of exploration operations in Section 47-1503(6). In that Section, "exploration operations" are defined as activities performed on the surface of land to locate mineral bodies and determine the mineability thereof. Therefore, the Surface Mining Act does not distinguish between exploration operations intended to discover the mineability and merchantability of a surface mine or a subsurface or underground hard rock mine.

Because that distinction is not made, it is my opinion that exploration prior to potential hard rock subsurface mining is in fact within the scope of the Surface Mining Act and is therefore regulated by the provisions of that Act.

In conclusion, underground mining and the surface affects of underground mining are not governed by the Surface Mining Act. However, exploration prior to potential hard rock subsurface mining is regulated by the Surface Mining Act. If you have any questions regarding this opinion, please feel free to give me a call.

Sincerely,
/s/ DAVID H. LEROY
Attorney General

DHL/tl

January 30, 1981

The Honorable Frank N. Henderson
Mayor
City of Post Falls
Post Office Box 789
Post Falls, Idaho 83854

**THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION,
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE**

Dear Mayor Henderson:

Your inquiry concerns the legality, under Article 8, Section 4, Idaho Constitution, of using the proceeds of voter-approved sewer revenue bonds to pay the cost, among other costs, of connecting private residences to the sewer connector and interceptor lines. The concern expressed by bond counsel is whether paying, out of public funds, the cost of installing lines across private property to connect to the public lines would constitute a loan or pledge of the city's faith and credit in violation of Article 8, §4.

For the reasons set forth below, it is our view that, under the particular factual background outlined in your letter, an expenditure of public funds to connect private dwellings to the public sewer connector and interceptor lines would constitute a legitimate public purpose and would not violate Article 8, §4, Idaho Constitution.

Questions concerning the interpretation of Article 8, §4, Idaho Constitution, must be viewed in light of the particular factual situations in which they arise. What constitutes a "public purpose" in one instance may not in another. As we understand the facts, however, the City of Post Falls, which now has a population of approximately 5700, has no sanitary sewer system and is the largest city in Idaho without such a system. The city is located on the Spokane aquifer, from which it derives its domestic water and which is, or may be, threatened by contamination due to the lack of a sanitary sewer collection and treatment system. Further, although not specifically stated in your letter, we

understand that the city is under some pressure from the Environmental Protection Agency to correct this situation. We also assume that the individual homeowners will ultimately be paying at least part of the cost of the system, including their hookups, through user fee revenues.

Article 8, §4, Idaho Constitution, provides:

No county, city, town, township, board of education, or school district, or other subdivision, shall lend, or pledge the credit or faith thereof directly or indirectly, in any manner, to, or in aid of any individual, association or corporation, for any amount or for any purpose whatever, or become responsible for any debt, contract or liability of any individual, association or corporation in or out of this state.

This and similar constitutional provisions (Article 8, §2; Article 12, §4, Idaho Constitution) generally are aimed at preventing governmental entities from giving credit or making donations in aid of private interests. The purpose of these constitutional provisions has been variously stated. One purpose is to prohibit direct or indirect aids to corporations or other private interests through inducement or subsidy. *Atkinson v. Board of Comr's. of Ada County*, 18 Idaho 282, P. 1046 (1910). Another is to prevent the public's money from passing into the control of private associations or parties; to confine municipal expenditures to public objects and public officers and agents. *Fluharty v. Board of County Comr's. of Nez Perce County*, 29 Idaho 203, 158 P. 320 (1916). It is to protect governmental entities from lending credit to or from becoming interested in any private enterprise, or from using funds derived from taxation in aid of any private enterprise. *School District No. 8 v. Twin Falls County Mutual Fire Ins. Co.*, 30 Idaho 400, 164 P. 1174 (1917). It is to prevent the state or one of its subdivisions from aiding, promoting, or sponsoring a particular commercial or industrial enterprise to the detriment of others in the field [*Village of Moyie Springs v. Aurora Mfg. Co.*, 82 Idaho 337, 353 P.2d 767 (1960)]; to prevent favored status being given to any private enterprise or individual in the application of public funds [*Boise Redevelopment Agency v. Yick Kong Corp.*, 94 Idaho 876, 499 P.2d 575 (1972)]; to preclude state action which principally aims to aid private schemes [*Idaho Water Resource Board v. Kramer*, 97 Idaho 535, 548 P.2d 35 (1976)].

Although not expressly so stated, the constitutional provision embodies the principle that expenditures of public funds must be for public purposes. 15 McQuillin, *Municipal Corporations*, §39.19; *Board of County Comr's v. Idaho Health Fac. Auth.*, 96 Idaho 498, 531 P.2d 588 (1975). What is a "public purpose" has been the subject of many court decisions. The test for a public purpose has been stated to be whether the expenditure confers a direct benefit of reasonably general character to a significant part of the public, as distinguished from a remote or theoretical benefit. 15 McQuillin, *Municipal Corporations*, §39.19. A test stated in *Visina v. Freeman*, 252 Minn. 188, 89 N.W. 2d 635 (1958), and which has expressly been recognized by the Idaho Supreme Court [*Idaho Water Resource Board v. Kramer*, 97 Idaho 535, 559, 548 P.2d 35, fn. 43 (1976)] is:

What is a "public purpose" that will justify expenditure of public money is not capable of precise definition, but the courts generally construe it to mean such an activity as will serve as a benefit to the community as a body and which, at the same time, is directly related to the functions of government.

If a proposed appropriation or expenditure meets the "public purpose" test, it is immaterial that, incidentally, private ends may also be advanced. 15 McQuillin, *Municipal Corporations*, §§39.19, 43.29; *Nelson v. Marshall*, 94 Idaho 726, 497 P.2d 47 (1972); *Boise Redev. Agency v. Yick Kong Corp.*, 94 Idaho 876, 499 P.2d 575 (1972); *Engelking v. Investment Board*, 93 Idaho 217, 458 P.2d 213 (1969). Even a direct loan of state funds to private associations or individuals will be upheld if it primarily furthers a broad public purpose, *Nelson v. Marshall*, *supra*. Conversely, if the primary object is to promote some private end, the expenditure is illegal even though it may incidentally serve some public purpose also. 15 McQuillin, *Municipal Corporations*, §39.19; *Village of Moyie Springs v. Aurora Mfg. Co.*, 82 Idaho 337, 353 P.2d 767 (1960); *State v. Idaho Power Co.*, 81 Idaho 487, 346 P.2d 596 (1959). Thus, if bonds are in fact issued primarily for a public purpose, they are not illegal merely because property owners and others are benefited by the public project. 15 McQuillin, *Municipal Corporations*, §43.29.

A sewerage system is clearly a legitimate public purpose for which bonds may be issued. 15 McQuillin, *supra*, §43.31; *Larsen v. Village of Lava Hot Springs*, 88 Idaho 64, 396 P.2d 471 (1964). *Idaho Code* Section 50-1029 expressly includes sewerage systems as works for which cities may issue revenue bonds. "Sewerage systems" are defined as including collecting sewers, connections, and all other appurtenances necessary, useful, or convenient for the collection, transportation, treatment and disposal of sewage. *Idaho Code* §40-1029(c). And, generally, the term "sewerage" indicates anything pertaining to sewers. *Pioneer Real Estate Co. v. City of Portland*, 119 Or. 1, 247 P. 319.

We are of the view that a line connecting a private dwelling to a public sewer collector line is a part of the sewer system and is thus a proper subject of the expenditure of sewer revenue bonds. We are further of the opinion that such an expenditure serves a primarily *public*, as opposed to a private, purpose, under the facts of your situation. No particular or individual homeowner is being singled out for preferential treatment, as was the case in *Village of Moyie Springs v. Aurora Mfg. Co.*, 82 Idaho 337, 353 P.2d 767 (1960). Nor are the benefited owners receiving the service free; they are presumably ultimately paying at least a portion of the cost through their sewer user charges. The principal and overriding purpose of the proposed expenditure appears to be the health and safety of the general public, which is clearly a public purpose. Mere incidental benefit to the private owner, we reiterate, does not render the expenditures unconstitutional. *Boise Redev. Agency v. Yick Kong Corp.*, 94 Idaho 876, 499 P.2d 575 (1972); *Wagner v. Salt Lake City*, 29 Utah 2d 42, 504 P.2d 1007 (1972).

The Idaho Supreme Court, in the early case of *Bevis v. Wright*, 31 Idaho 676, 175 P. 815 (1918), held that, to justify a court in declaring a tax or public expenditure invalid on the ground that it was not for the benefit of the public, the absence of a public purpose must be "so clear and palpable as to be immediately perceptible to every mind." In our view, the expenditure in question does not lack such public purpose. On the contrary, the public purpose appears to us to be clear and apparent.

Although this particular point of law does not yet appear to have been decided by the Idaho Supreme Court, we see no violation of Article 8, §4, Idaho Constitution, under the facts presented.

Sincerely,
/s/ MICHAEL C. MOORE
Deputy Attorney General
Division Chief
Local Government Division

DHL/tl

cc: Roy J. Koegen

February 5, 1981

The Honorable Darwin L. Young
Idaho House of Representatives
Statehouse
Boise, Idaho 83720

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION,
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Dear Representative Young:

I am responding to your January 29, 1981 request for legal guidance relative to the following questions:

Do Idaho Code §§63-923 and 63-2220 take precedence over Idaho Code §39-425?

In particular, is the provision in subsection (1) of §39-425 that the Director of the Department of Health and Welfare include in his budget request to the legislature a request for matching funds for health districts based upon sixty-seven percent of amounts pledged to be raised by the levy of each county pursuant to §31-862 still in effect given passage of the One Percent Initiative and budget freeze legislation?

Neither §63-923 nor §63-2220 expressly repeals or supersedes the sixty-seven percent provision of §39-425. Moreover, the one percent and budget freeze statutes do not impliedly repeal or supersede the sixty-seven percent standard.

An irreconcilable conflict between legislative acts is necessary before an implied repeal is effected. 1A Sutherland, *Statutory Construction* §23.9. The mentioned statutes do not conflict irreconcilably, if at all. *Idaho Code* §63-923 is an ad valorem tax limitation measure. *Idaho Code* §63-2220 freezes the ad valorem funded portion of budgets of taxing districts. These statutes do not purport to cover the legislative appropriations process or state funding for health districts. Consequently, there is not an irreconcilable conflict.

It is thus my opinion that *Idaho Code* §§63-923 and 63-2220 do not repeal or otherwise supersede the sixty-seven percent requirement for budget requests made by the Director on behalf of health districts.

If you have any questions about this advice, please do not hesitate to contact me.

Sincerely,
/s/ LARRY K. HARVEY
Chief Deputy Attorney General

LKH/nt

February 9, 1981

The Honorable Dan Kelly
House of Representatives
Statehouse
Boise, Idaho 83720

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION,
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Dear Representative Kelly:

This responds to your request for legal guidance concerning the proposed amendment to *Idaho Code* §42-1106, relating to the right of eminent domain in the construction of irrigation ditches and canals.

The proposed amendment provides a specific statutory formula for determining the amount of compensation a condemnor of property for irrigation purposes would be required to pay the condemnee. As written, the contemplated statutory change would place a court that was determining damages in an irrigation ditch or canal eminent domain proceeding in the role of merely computing damages pursuant to the statutorily articulated formula. The criteria used in setting the amount of compensation would be legislatively, not judicially, determined.

It is a general rule of American law that the judicial branch of government be invested with the power to determine the level of compensation to be paid in an eminent domain proceeding:

It is universally conceded that the amount of compensation to be paid an owner of the land which has been taken from him by the exercise of the power of eminent domain is a judicial question and cannot be decided by the legislature. Van Brunt, *Nichols on Eminent Domain*, §8.9.

The above cited quotation from a noted legal treatise on the law of eminent domain is a summation of the current existing case law in the states of the union whose courts have examined and ruled upon the

issue of condemnation damages. Although the Idaho Supreme Court has never ruled on the precise issue of whether the determination of condemnation damages is a judicial function, case authority from our sister states would be, in our opinion, exceptionally persuasive to an Idaho court ruling on the issue.

The highest appellate courts of twenty three states have held that any attempt by the legislative branch of government to limit the amount of compensation in condemnation proceedings, or to otherwise legislatively determine the level of compensation in such proceedings is an unconstitutional invasion of the rights, responsibilities and duties of the judicial branch of government. These court rulings were based upon the constitutional principle of separation of power among the three branches of American state governments: *McCune v. City of Phoenix* 82 Ariz 98, 317 P.2d 537; *Pima County v. Cappony*, 83 Ariz 348, 321 P.2d 1015; *Staub v. Mud Slough Drainage Dist. v. Morledge*, 231 Ark 815; 332 S.W.2d 882; *Beals v. Los Angeles* 23 Ca2d 381, 144 P.2d 893; *Enfield Toll Bridge Co. v. Connecticut River Co.*, 7 Conn 28; *State v. Wingfield*, 202 So.2d 184; *Daniels v. State Road Dep't*, 170 So.2d 846; *Hughes v. Todd*, 2 Duv 188; *Pennsylvania R. Co. v. Baltimore, etc., R. Co.* 60 Md 263; *Baltimore v. Bregenzer*, 125 Md 78, 93 A 425; *Baltimore v. Baltimore Marine Works*, 152 Md 367, 136 A 829; *Lentell v. Boston, etc., R. Co.*, 187 Mass 445, 73 NE 542; *Central Advertising Co. v. City of Ann Arbor*, 201 N.W.2d 365; *State v. Chicago, etc., R. Co.*, 35 Minn 402; *Volden v. Selke*, 251 Minn 349 87 N.W.2d 696; *State v. North Star Concrete Co.*, 265 Minn 483, 122 N.W.2d 118; *Isom v. Mississippi Cent. R. Co.*, 36 Miss 300; *Caruthersville School Dist. No. 18 v. Latshaw*, 233 S.W.2d 6; *State v. Platte Valley P.P. & I. Dist.*, 147 Neb 289, 23 N.W.2d 300, 166 A.L.R. 1196; *Webber v. City of Scottsbluff*, 155 Neb 48, 50 N.W.2d 533; *State ex rel Milchem, Inc. v. Third Judicial District Court*, 445 P.2d 148; *In re Opinion of the Justices*, 66 NH 629, 33 A 1076; *New Hampshire Water Resources Bd. v. Pera*, 226 A.2d 774; *New Jersey W.S. Co. v. Butler*, 105 NJL 563, 148 A 616; *Housing Authority of Borough of Clementon v. Myers*, 280 A2d 216; *In re New York*, 190 NY 350, 83 NE 299, 16 LRA (NS) 355, mdf'g 120 App. Div. 849, 105 NYS 750; *City of Cleveland v. Langeneau Mfg. Co.*, 70 Ohio Abs 257, 128 N.E.2d 130; *Commonwealth v. Pittsburgh, etc., R. Co.*, 58 Pa. 26; *Duck River Elec. Mem. Corp. v. City of Manchester*, 529 S.W.2d 202; *Richmond v. Goodwyn*, 132 Va 442, 112 SE 787; *State v. Yelle*, 49 Wash2d 166, 279 P.2d 645.

The courts of the federal government have arrived at the same conclusion as have the above cited courts. The United States Supreme Court has ruled that attempts by Congress to legislatively determine the amount of damages that could be awarded in an eminent domain action were unconstitutional under the doctrine of separation of powers. In *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 13 S. Ct. 622, 36 L.Ed 463 (1893), the Supreme Court considered the constitutionality of a federal statute that would have provided a mechanism for determining the amount of damages in a condemnation action. The court stated:

By this legislation Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial, and not a legislative, question. The legislature may determine what private property is needed for public purposes;

this is a question of political and legislative character. But when the taking has been ordered, the question of compensation is judicial. It does not rest with the public taking of property, through Congress or the legislature, its representatives, to say what compensation shall be paid, or even what shall be the rule of compensation. The constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry. 13 S. Ct. 625.

This rule continues to be adhered to by the federal courts. *Seaboard Air Line R. Co. v. United States*, 261 US 299, 67 L.Ed 664, 43 S. Ct. 354; *United States v. New River Collieries Co.*, 262 US 341, 67 L.Ed. 1014, 43 S. Ct. 565; *Newburyport Water Co. v. Newburyport*, 85 F. 723; *Railway Steel Spring Co. V. Chicago, etc., R. Co.*, 261 F 690, cert. den. 248 U.S. 586, 63 L.Ed 434, 39 S. Ct. 184; *National City Bank v. United States*, 275 F 855, app. dism'd 263 US 726, 68 L.Ed 527, 44 S. Ct. 32; *United States v. McIntosh*, 2 F. Supp. 244, reh. den. 3 F. Supp. 715, app. dism'd 70 F. 2d 507, cert. den. 293 US 586, 79 L.Ed 682, 55 S. Ct. 101; *Campbell v. Chase National Bank*, 5 F. Supp. 156, aff'd 71 F.2d 669, cert. den. 293 US 592, 79 L.Ed 686, 55 S. Ct. 108; *United States v. 9.94 Acres of Land*, 51 F. Supp. 478; *United States v. 60,000 Square Feet of Land*, 53 F. Supp. 767; *United States v. West Virginia Power Co.*, 56 F. Supp. 298; *United States v. 677.50 Acres of Land*, 239 F. Supp. 318; *Cahill v. Cedar County, Iowa* 367 F. Supp. 39; *United States v. 416.18 Acres of Land*, 514 F.2d 627.

Idaho Constitution, Article 5, §13 delineates the limits of legislative power respecting the courts:

Power of Legislature Respecting Courts. — *The legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightfully pertains to it as a coordinate department of government; but the legislature shall provide a proper system of appeals and regulate by law, when necessary, the method of proceeding in the exercise of their powers of all the courts below the Supreme Court, so far as the same may be done without conflict with this constitution . . . (Emphasis added).*

In reading a conclusion on whether this general rule of law would be applied by an Idaho court, it is necessary to discuss the provisions of the Idaho Constitution dealing with separation of powers between the three departments of state government in general and specifically with the power of the legislative branch relative to the judicial branch. Idaho Constitution, Article 2, §2 provides for the separation of powers between the three coordinate branches of state government:

Departments of Government: The powers of the Government of this state are divided into three distinct departments, the legislative, executive and judicial; *and no person or collection of persons charged with the exercise of powers properly belonging to one of those departments shall exercise any powers properly belonging to either of the others . . . (Emphasis added).*

On the basis of the previously cited case authority and state constitutional provisions, we believe that an Idaho court would find the proposed statutory amendment as constituting an unconstitutional usurpation of

the powers and prerogatives of the judicial branch of government. Accordingly, it is our opinion that the proposed amendment, as written, is unconstitutional.

In conclusion, we wish to draw your attention to one final consideration that is relevant to this issue. Idaho Constitution, Article 1, §14 states:

Private property may be taken for public use, but not until a *just compensation, to be ascertained in the manner prescribed by law*, shall be paid therefor. (Emphasis added).

It has consistently been the position of this office that this section is authorizing the legislature to prescribe the "manner" or procedure which the courts of the state are to follow in determining the level of compensation in eminent domain proceedings. The judicial branch is constitutionally empowered to determine the criteria used to set the level of compensation. A different result would mean that the legislature defines what is constitutional "just compensation", a function that is clearly reserved to the courts under Idaho Constitution, Article 2, §3 and Article 2, §2.

If we can be of further assistance on this or any other matter, please do not hesitate to contact us.

Very truly yours,
/s/ ROY L. EIGUREN
Deputy Attorney General
Division Chief — Legislative/
Administrative Affairs

RLE/t

February 13, 1981

The Honorable Richard R. Eardley
Mayor
City of Boise
Post Office Box 500
Boise, Idaho 83701

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION,
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Dear Mayor Eardley:

Knowing that you needed an early answer to your question concerning the power of local governments to regulate motor vehicle emissions, we are summarizing for you in this letter the principal points of law involved rather than delaying our reply in order to complete the additional research, drafting, and review procedure necessary for a formal Attorney General Opinion. Briefly stated, our conclusions are as follows:

1. Article 12, §2, Idaho Constitution, grants to all cities and counties, directly and without the need of further enabling legislation, the power to enact and enforce local police regulations not in conflict with the general laws. These police powers include the power to adopt reasonable regulations for the furtherance and protection of the public health, safety, and welfare. These powers include the power to protect the public against environmental pollution, including air contamination. *State v. Clark*, 88 Idaho 365, 399 P.2d 955 (1965); *Rowe v. City of Pocatello*, 70 Idaho 343, 218 P.2d 695 (1950); *State v. Finney*, 65 Idaho 630, 150 P.2d 130 (1944); *Sittner v. City of Seattle*, 384 P.2d 859 (Wash. 1963); 7 McQuillin, *Municipal Corporations*, §§24.493, 24.494.

2. The exercise of the police power is not unlimited; it must be reasonable and must not conflict with general laws, including applicable state and federal legislation. Article 12, §2, Idaho Constitution. In addition, where the state has so fully occupied and regulated a field as to indicate an intent to preempt that area of regulation to the exclusion of cities and counties, local ordinances on that subject are invalid. *Caesar v. State*, 101 Idaho 158, 610 P.2d 715 (1980).

3. A local police power ordinance is not in conflict with general law merely because the state has legislated on the same subject; the same area may be proper both for state and local regulation. *State v. Poynter*, 70 Idaho 438, 220 P.2d 386 (1950); *State v. Musser*, 67 Idaho 214, 176 P.2d 199 (1946). Nor is a local ordinance invalid merely because it goes further than the state's regulation and makes illegal activities which are not prohibited by state law. *Voyles v. City of Nampa*, 97 Idaho 597, 548 P.2d 1217 (1976); *Taggart v. Latah County*, 78 Idaho 99, 298 P.2d 979 (1956); *Gartland v. Talbott*, 72 Idaho 125, 237 P. 2d 1067 (1951); *Clark v. Alloway*, 67 Idaho 32, 170 P.2d 425 (1946). An ordinance is not in conflict with state law merely because the state once prohibited the same conduct and later withdrew its prohibition. *State v. Musser*, *supra*.

4. The state, through Title 49 of the *Idaho Code*, has extensively regulated motor vehicles and appears to have fully preempted, by statute, such areas as motor vehicle registrations and licensing and traffic control (except in those areas of traffic control expressly reserved to local authorities in I.C. §49-582), and at one time required motor vehicle inspection as a condition to registration and licensing of motor vehicles. However, present Title 49 does not appear to have regulated, to the point of preemption of local authorities, the area of vehicle emission control and inspection. I.C. §49-835(b) requires that motor vehicles shall be so equipped "as to prevent the escape of excessive fumes and smoke," but this does not appear to us to be such a pervasive regulation as to amount to the type of preemption which the Court found in *Caesar v. State*, 101 Idaho 158, 610 P.2d 517 (1980).

5. It is possible that I.C. §49-581 could be viewed as preempting local governments from any regulation or inspection of motor vehicles except as expressly permitted in I.C. §49-581. I.C. §49-581 provides that "no local authority shall enact or enforce any ordinance on a matter covered by the provisions of this *title* unless expressly authorized." (Emphasis added.) If "title" refers to all of Title 49, the courts could view local governments as lacking authority to regulate motor vehicle emission controls. Indeed, an earlier opinion of this office, Attorney General Opinion No. 78-42 (November 22, 1978), so indicated. However, Title 49 does not appear to us to cover this area and therefore would not fall within the prohibition of I.C. §49-581. In addition, I.C. §49-581 was enacted as part of an act (Chapter 152, 1978 Idaho Session Laws)

which referred only to Chapters 5, 6, and 7 of Title 49, dealing with traffic control on streets and highways, and can be viewed as being limited to preemption of that area only. Although only actual litigation or legislative clarification of this provision could determine the question with certainty, we are of the view that I.C. §49-581 does not preempt local authorities in the area of motor vehicle emission control and inspection. To this extent, we disagree with that portion of Attorney General Opinion No. 78-42.

6. We are further of the view that the area of air contamination control is not preempted by the state by the Environmental Protection and Health Act of 1972, I.C. §§39-101 et seq. In fact, under I.C. §39-105(3)(1), it is expressly made the policy of the state to assist and encourage counties and cities in the control and abatement of environmental and health problems. We find no indication here of an intent by the legislature to preclude cities and counties from enacting further regulations in the field of air pollution control.

7. Although cities and counties do not presently have express statutory authority to regulate and inspect for motor vehicle emission controls, and thus would have to rely primarily upon their constitutional police powers granted by Article 8, §2, Idaho Constitution, cities do have certain statutory powers over health, safety, and nuisance control under I.C. §§50-301, 50-302, 50-304, and 50-334.

8. However, since the legislature has apparently preempted the area of motor vehicle registration and licensing, additional enabling legislation most likely would be required in order for a county to require inspection and compliance with local emission control regulations as a condition of vehicle registration. Enforcement of local regulations would have to be conducted at some other level.

9. We do not view I.C. §49-582(t) (temporary or experimental regulations for emergencies or special conditions) as authority for long-term emission control regulations. Rather, we recommend that primary reliance be placed on the grant of constitutional police powers discussed above.

10. Additional enabling legislation in this area would be desirable from the standpoint of clarifying and preventing problems of conflict and preemption under I.C. §49-581.

Sincerely,
/s/ DAVID H. LEROY
Attorney General

DHL/tl

February 25, 1981

Jack C. Riddlemoser
Attorney at Law
Post Office Box 373
Meridian, Idaho 83642

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION,
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Dear Jack:

You have requested assistance on the question whether the part-time mayor of Kuna may lawfully receive compensation from the City for doing certain bookkeeping services on a city sewer project.

Based upon the interpretation given to *Idaho Code* Section 59-201 and similar statutes by the Idaho Supreme Court, particularly in the cases of *McRoberts v. Hoar*, 28 Idaho 163, 152 P. 1046 (1915), and *Nampa Highway District No. 1 v. Graves*, 77 Idaho 381, 293 P.2d 269 (1956), I conclude that it would not be lawful for the city to pay the mayor, over and above her regular salary or compensation as mayor, for such services.

I.C. §59-201 provides that city officers must not be interested in any contract made by them in their official capacity, or by an body or board of which they are members. This statute embodies the general rule that public officers are prohibited from contracting with the public agency they represent, either for extra compensation for the services they are required to perform (4 McQuillin, *Municipal Corporations*, §12.193; 63 Am. Jur. 2d, *Public Officers and Employees*, §382), or for additional services not expressly required by their office. *McRoberts v. Hoar*, *supra*; *Nampa Highway Dist. No. 1 v. Graves*, *supra*; 63 Am. Jur. 2d, *Public Officers*, *supra*, §383 (noting that Idaho follows the rule prohibiting compensation for extra services).

McRoberts V. Hoar, 28 Idaho 163, 152 P. 1046 (1915), is a case in point. There, the county commissioners approved extra compensation to a county treasurer for work involving the updating of land indexes of the county, something which was not connected with the normal duties of a county treasurer. The Idaho Supreme Court stated that such a contract was invalid, saying that, although the officer was not obliged to perform any acts not prescribed by law, if he chooses to do so, he cannot claim extra compensation for such services. The Court stated that, *even in the absence of statutory provisions*, such a contract is void.

"The fact that the acceptance of such employment was without fraud and prejudice to the interest of the taxpayers is immaterial. Even in the absence of statutory provisions, such a contract is void. . .

* * *

"It is the relation that the law condemns and not the results." 28 Idaho at 175.

The *McRoberts* case was followed in *Givens v. Carlson*, 29 Idaho 133, 157 P. 1120 (1916); *Sanborn v. Pentland*, 35 Idaho 639, 208 P. 401 (1922); *Benewah County v. Mitchell*, 57 Idaho 1, 61 P.2d 284 (1936); and *Nampa Highway District No. 1 v. Graves*, 77 Idaho 381, 293 P.2d 269 (1956). The last case appears also closely in point. Defendants were elected commissioners of the highway district. They received monies for services performed while also acting as superintendent of highways, foreman of bridge construction, and superintendent of noxious weed control. In an action brought to determine the validity of such payments, the Idaho Supreme Court held them to be illegal, even though it was conceded that the district received full value for their services and could not have received the services for less money elsewhere. The Court held that it was simply a part of the general policy of the state to prohibit such payments,

and that a public official cannot sell his services to the district he represents, or collect money therefor, beyond the compensation authorized by the statute.

Related authorities include 3 McQuillin, *Municipal Corporations*, §12.136; *Robinson v. Huffaker*, 23 Idaho 173, 129 P. 334 (1913); and *Collman v. Wanamaker*, 27 Idaho 342 (1915).

It appears, then, that the law of Idaho prohibits payment to a mayor for additional or outside services, even though unrelated to that person's official duties, even in the absence of fraud, and even where the taxpayers actually benefit thereby.

I hope this will be helpful in advising the city.

Sincerely,
/s/ MICHAEL C. MOORE
Deputy Attorney General
Division Chief
Local Government Division

MCM/tl

February 25, 1981

Craig R. Wise
Duncan, Sims & Covington, P.A.
Attorneys at Law
1621 North 3rd Street, Suite 100
Coeur d'Alene, Idaho 83814

**THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION,
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE**

Dear Mr. Wise:

This letter is an answer to your questions concerning the acceptance of dedications in plats and the conflict between the Worley Highway District and Kootenai County. You state that it is the Worley Highway District's position that the highway district is the only entity that can accept roads for public use within the district. Specifically, you have asked whether the county commissioners or the highway district have the final say in accepting and approving plats in areas outside cities.

After considering the matter, we believe that the various boards of county commissioners, as set forth in §§50-1308, 50-1312, and 50-1313, *Idaho Code*, are the entities who accept or reject plats outside of cities, and, when taken together, we agree with the Kootenai County Prosecuting Attorney's opinions CO-80-PZ-43 and CO-80-PZ-52, dated respectively November 3, 1980 and December 10, 1980.

As you have set out in your letter and attachments, the conflict arises because, although the above named sections of the code clearly state that the county commissioners are to approve plats outside of cities and accept them,

the Idaho Highway District Law, particularly §40-1611, *Idaho Code*, states that, in respect to highways within the districts, all the powers and duties that would by law be vested in the county commissioners and the district road overseer are to be carried out by the Highway District Commissioners. No case law has been found either in Idaho or in other states which would tend to give much guidance in this matter. Section 31-802, *Idaho Code*, gives the county commissioners the power to supervise the official conduct of officers of all *districts* and other subdivisions of the counties, see that they faithfully perform their duties, direct prosecution for delinquencies, require them to renew their official bonds and to require reports and to require districts to present their books and accounts for inspection. Under §40-1605, *Idaho Code*, when a vacancy occurs in one of the highway district commissioners seats, and the remaining highway district commissioners are not able to agree so as to filling that vacancy, the chairman of the board of county commissioners becomes a member of the highway district board to fill the vacancy. Highway district boards are required to make an annual report to the board of county commissioners on or before February 1st of each year, as to the condition of the work, construction and maintenance and repair of all highways within the district, accompanied by maps and documentation under §40-1621, *Idaho Code*. Under §40-1623, *Idaho Code*, the county commissioners may at any time inspect the records of highway districts and have access to all such records and books of the district. Also, the funds of the district generally come first to the counties and then to the districts under a number of sections, such as 40-405, 40-1628, 40-1634, 40-1641 through 40-1646, *Idaho Code*. And under the provisions of §40-1613, *Idaho Code*, if main trunks or main highways connecting different parts of a county or leading outside of a county are not kept in repair by the highway district, the county commissioners, after giving proper notice and time to start work, may repair the same and withhold the funds necessary for doing so from the money to be paid to the district. Also, the county commissioners may issue bonds for repair and construction of roads and bridges within a county under §40-1665, *Idaho Code*.

Although no new highway districts have been formed since approximately 1933, see §40-1601, *Idaho Code*, highway districts were originally created by the county commissioners and the county commissioners set the original boundaries for such districts. *Strickfaden v. Greencreek Highway District*, 42 Idaho 738, 749, 248 P. 456 (1926); *Compiled Statutes of 1919*, §§1492 to 1495. Although highway districts and good road districts have jurisdiction over the roads within these districts, these districts form a part of the county road systems under §40-109(b), *Idaho Code*. Also, the law as to public plats was completely rewritten in 1967, and this duty of accepting plat dedications was left with the county commissioners at that time. The sections relating to acceptance of dedications of plats were amended in 1978, as noticed by the Kootenai County Prosecutor, and was changed only to allow county wide highway districts to accept or reject dedications of roads and plats.

Also, there is another matter of concern here. Dedications of plats may concern dedications of public lands for a number of purposes such as parks, school land, open land and other things in no way related to or part of the road systems. These other dedications would more likely concern the county commissioners than highway district commissioners whose only concern is with construction and maintenance of highways, whereas, the county commissioners are generally required to be concerned with the welfare of the entire county. Platting and its acceptance appear to cover more than just highways. Thus, it could be argued that for this reason, this duty was left with the county commissioners.

There is some law in Idaho, and elsewhere throughout the nation, as to what happens when property is dedicated to public use and either not formally accepted or not used. The answer to such questions depends generally upon the factual situations. Cases such as *Boise City v. Hon*, 14 Idaho 272, 94 P. 167; *Hanson v. Proffer*, 23 Idaho 705, and *Boise City v. Fails*, 94 Idaho 840, along with a number of other cases, have all dealt with questions relating to dedication. There is a complete chapter on this subject in volume eleven of *McQuillin on Municipal Corporations* (Chapter 33). There are two types of dedications of lands to the public. One is statutory, the other is a common law dedication. Statutory dedication is simply dedication under the statutes, and in order to be effective as a statutory dedication, any dedication must carefully follow all of the substantial requirements of the law in order to make the dedication effective.

In 1978, I dealt with a very similar question regarding the township of Atlanta. A copy of my letter to Judge Rowett and G. W. Beavers is attached hereto.

While none of the items above discussed are in and of themselves particularly decisive of this matter, we feel that, when they are taken together, along with the matters discussed in the prosecutor's two opinions, they tend to show that the county commissioners have the duty to supervise the highway districts and that the county commissioners have the duty to provide generally for the welfare of the county, under §§31-801, 31-802, 31-803, 31-804, *Idaho Code*. The case law set forth in *McQuillin on Municipal Corporations*, Chapter 33, shows generally that statutory dedication laws are to be carefully followed in all substantial requirements, 11 *McQuillin*, §33.04. The case of *Boise v. Fails*, 94 Idaho 840, 499 P.2d 326, tends to be persuasive and by analogy tends to lead to the idea that platting is the concern of the county commissioners.

On the other hand, if one looked only at Title 40, §§40-1611, and 40-1613, *Idaho Code*, one could conclude that highway district commissioners should be the ones to accept or reject roads for purposes of plats. But when all of the above factors are taken together, it would seem to us to be more likely that the duty of either accepting or rejecting public dedications in plats was purposefully placed in the hands of the county commissioners.

We suggest that the proper course of procedure under existing Idaho State law is that the county commissioners should be advised by the highway district commissioners of the concerns of the highway district commissioners in regard to acceptance or rejection of roads within plats and that the highway district commissioners of the various highway districts should ask the county commissioners to provide by ordinance or resolution that highway districts are to be advised of any such proposed dedication of streets, so that the highway districts can present their views and concerns to the commissioners as to the various proposed dedications. Perhaps guidelines could be worked out as to construction of roads within plats before they are accepted. This of course would be up to the county commissioners.

Sincerely,
/s/ WARREN FELTON
Deputy Attorney General

WF/tl

Enclosures

cc: Glen E. Walker
Kootenai County Prosecuting Attorney

March 4, 1981

The Honorable Gary L. Montgomery
House of Representatives
Statehouse
Boise, Idaho 83720

**THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION,
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE**

Dear Representative Montgomery:

This responds to your request of February 27, 1981 for legal guidance relative to House Bill #33. Specifically, you have asked us to review the proposed legislation for the purpose of offering an opinion on its constitutionality pursuant to both the federal and state constitutions.

As written, H.B. #33 is identical to an existing statute in the State of Massachusetts, GLC71 §1A, Mass. Code Anno. Both the Massachusetts statute and the proposed Idaho Act provide for a mandatory one minute period of silence at the beginning of each daily public school class for the purpose of "meditation or prayer," but do not require that a student pray or meditate. They require only one minute of silence on the part of a public school student.

The First Amendment of the U.S. Constitution provides in relevant part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." This prohibition is applicable to the states through the Fourteenth Amendment to the Constitution. *School District of Abington Township v. Schempp*, 374 US 203, 215-216, 10 L.Ed. 2d 844, 83 S.Ct. 1560 (1963).

The most recent expression of the United States Supreme Court's interpretation of the First Amendment freedom of religion clause is contained within the case of *Stone v. Graham*, ___ US ___, 66 L.Ed.2d 199, 101 S. Ct. ___, (1980). In *Stone*, the high court reiterated its three part test for determining whether a challenged state statute is permissible under the establishment (separation of church and state) clause of the United States Constitution.

First, the statute must have a secular purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, the statute must not foster "an excessive government entanglement with religion." 66 L.Ed.2d at 201; *Lemon F. Kurtzman*, 403 US 602, 612-613, 29 L.Ed.2d 475, 91 S. Ct. 2105 (1971).

This three pronged test was applied to the previously cited Massachusetts statute by a three judge panel of the Federal District Court of the District of Massachusetts in the case of *Gaines v. Anderson*, 421 F. Supp. 337 (1976). In *Gaines*, the court found that the "meditation or prayer" statute did not violate any portion of the three part test relating to freedom of religion and accordingly was not violative of the First Amendment Establishment clause of the United States Constitution.

In its analysis of the issue the *Gaines* court stated that the application of the Supreme Court's three prong freedom of religion test to a state statute "cannot be scientifically precise . . . for the line which separates the secular

from the sectarian is an elusive one." In this light, the court went on to say that:

What is at stake in the First Amendment religion clause is the policy of separating church and state to the extent practicable in a nation whose institutions reflect that our heritage is religious and whose people in large measure adhere to a variety of religious beliefs and creeds. *The Court's opinions generally have recognized that the underlying policy of the First Amendment's prohibitions is the prevention of such dependence of religion on government and such interference by government with religion "that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point."* 421 F. Supp. at 341. (Emphasis added.)

The court concluded that the lack of mandatory direction to students to meditate or pray was indicative of a legislative purpose to maintain neutrality on the matter of school prayer. The statute, in the court's opinion, required that students be silent for a period of time but did not specifically require that they meditate or pray. There was no state action requiring that students recite a prayer or otherwise engage in a mandated religious program in the classroom. The option to choose to meditate was viewed as constituting a non-religious exercise, since meditation connotes serious reflection or contemplation on a subject which may be "religious, non-religious or irreligious." Accordingly, there was no "excessive government entanglement with religion" nor did the statute have, as a primary effect, the advancement or inhibition of religion.

In addition, the court found that "a minute of silence for meditation" demonstrated a fundamental intention by the legislature to promote secular values, that is, greater student self-discipline and respect for teacher authority. The option for the student to use the minute of silence to either pray or meditate was, in the court's opinion, a method of promoting a legitimate secular purpose without mandating a required in-class religious exercise and thus was constitutionally permissible.

Although an Idaho court has not reviewed the precise issue raised by the proposed statute, it would, we believe, find the above articulated case authority persuasive in reaching a decision on the statute's constitutionality under the federal constitution. This belief is based on the fact that the Supreme Court's Establishment Clause test for validity has been applied to a statute that is identical to the legislation proposed in Idaho. Accordingly, it is our opinion that H.B. #33 would not violate the First Amendment clause mandating separation of church and state if it were enacted into law as written.

Since H.B. #33 does not specifically require that a student spend the statutorily required minute of silence in prayer, we believe that it is not violative of Article 9, Section 6 of the *Idaho Constitution* which provides that "no teacher or student of any such institution shall ever be required to attend or participate in any religious service whatever." As noted above, H.B. #33 does not mandate attendance or participation in any religious service or exercise.

Based upon the above analysis and discussion, the substitution of the word "may" for "shall" would not alter our opinion on the constitutionality of the proposed measure. We interpret the meditation or prayer component of the bill as permissible. The only mandated requirement is silence.

LEGAL GUIDELINES OF THE ATTORNEY GENERAL

If we may be of further assistance in this or any other matter, please do not hesitate to contact this office.

Very truly yours,
/s/ ROY L. EIGUREN
Deputy Attorney General
Division Chief — Legislative/
Administrative Affairs

RLE/t

March 5, 1981

The Honorable Kermit V. Kiebert
Assistant Minority Leader
Idaho State Senate
Statehouse
Boise, Idaho 83720

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION,
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Dear Senator Kiebert:

This responds to your request for legal guidance relative to S.B. 1133. Prior to addressing the specific questions you posed in your letter to us of February 25, 1981, we believe it necessary to first discuss several general legal concepts associated with federal acquisition of land within the various states of the union.

U.S. Constitution Article 1, §18, cl. 17, which is referred to in S.B. 1133, provides Congress with exclusive jurisdiction as a sovereign government:

... over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards and other needful buildings ...

The United States Supreme Court has interpreted the meaning of the above cited constitutional provision on several occasions. *Kohl v. United States*, 91 US 367, 23 L.Ed. 449, *Paul v. United States*, 371 US 245, 9 L.Ed. 2d 292, *James v. Dravo Contracting Co.*, 302 US 134, 82 L.Ed 155, *Ft. Leavenworth R. Co. v. Lowe*, 144 US 525, 29 L.Ed 264. The high court determined that, pursuant to this constitutional clause, when if the United States government acquires land with the consent of the state Legislature, jurisdiction over such land by the federal government becomes exclusive. Exclusive federal jurisdiction means that the federal government, acting in its capacity as a sovereign government, has complete control over all civil and criminal matters relating to or arising on land within such jurisdiction. A state may not exercise any legislative authority in relation to property and activities of individuals and corporations within territory where the United States has exclusive jurisdiction. *Mississippi River Fuel Corp. v. Fontempt*, C.A. La. 1956, cert. denied 77 S. Ct. 213, 234 F.wd 898.

The Supreme Court has recognized, however, that the federal government may acquire lands within any state by purchase or condemnation without the consent of the state. The "consent" contemplated by the above articulated constitutional provision relates only to exclusive federal jurisdiction; that is, *only when exclusive federal jurisdiction is desired or required over lands purchased by the federal government is state legislative consent constitutionally necessary* to effectuate the purchase.

The federal courts have recognized that the federal government may obtain land by purchase or condemnation when it deems it necessary to do so. The various state governments may not preclude the federal government from exercising this power. *Kohl v. United States, supra*. When the federal government does obtain land absent state legislative consent, it holds the land in a manner like any other individual purchaser or proprietor and, as such, is subject to all the laws of a state except that the land may not be taxed by the state. *Ryan v. State*, 188 Wash. 115, 61 P.2d 1276, affirmed 58 S. Ct. 233, 302 U.S. 186, 82 L.Ed. 187. As to any lands purchased or condemned by the federal government for its own use, a state legislature may, at any time, cede state jurisdiction so as to give exclusive jurisdiction to the federal government. *Paul v. United States, supra*. Finally, the respective state legislatures may condition consent to federal jurisdiction over land within a state provided that the conditions do not unduly hinder the goals and purposes of the federal government's use of the land. *U.S. v. Unzeuta*, 50 S. Ct. 284, 281 US 138, 74 L.Ed 761.

We now turn our focus to resolving the various specific questions you have posed to us.

As written, we believe that H.B. 1133 does pose "preemption" issues of major magnitude. As stated previously in this letter, the United States Supreme Court has emphatically stated that a state government may not preclude the federal government from acquiring land within a state for a necessary federal purpose. The method of acquisition may be by purchase or condemnation. Such authority or power derives from the "inherent" power of a sovereign government to exercise its power of eminent domain. State attempts to restrict or preclude this federal power would, in our opinion, be deemed unconstitutional as a usurpation of the federal sovereignty guaranteed by the Supremacy clause of the United States Constitution. In essence, it constitutes an infringement upon the constitutionally derived principle of division of powers, rights, and responsibilities between the federal and state governments.

Based upon the foregoing analysis and discussion, it is our opinion that the proposed new subsection to *Idaho Code* §58-702(2), would be declared unconstitutional if it were subjected to scrutiny by a court of law.

The amendatory language sought to be inserted into subsection (1), Section 58-702, *Idaho Code*, by S.B. 1133, provides that state consent is given to federal land purchases "already made, or that may hereafter be made, by the government of the United States in accordance with Article 1, Section 8, of the Constitution of the United States . . ." The present statute provides for consent to federal purchases "of any lots, or

tracts of land, within this state, for the use of such government, and to erect thereon and use such building, or other improvements, as may be deemed necessary by said government, . . .”

As to any federal land purchases already made pursuant to the existing Section 58-702, the following general rule of law is applicable:

A state legislature’s consent to acquisition of lands in a state by the United States may not be revoked or withdrawn unless federal jurisdiction over such lands has not been accepted. *State v. DeBerry*, 32 SE.2d 617, 224 N.C. 834.

Accordingly, if the federal government has commenced exclusive jurisdiction over lands previously purchased, and said jurisdiction was established pursuant to the existing language of Section 58-702, the legislature is without legal authority to revoke, via a change in the section, such consent. We have previously stated that a state may condition its consent to grant exclusive jurisdiction to the federal government over lands it purchases. The application of Section 58-702, as amended, to lands purchased in the future by the federal government would mean that legislative consent to federal jurisdiction over those lands is conditioned upon the premise that the purchased land be used for a purpose stated in Article 1, §8. Such a requirement would, in our opinion, be legal.

If we may be of further assistance in this or any other matter, please feel free to contact this office.

Very truly yours,
/s/ ROY L. EIGUREN
Deputy Attorney General
Division Chief — Legislative/
Administrative Affairs

RLE/t

cc: Senator Floyd
Senator Steen

March 13, 1981

Representative Mike Strasser
Idaho State House of Representatives
Statehouse Mail

**THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION,
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE**

Dear Representative Strasser:

This is in response to your request for legal guidance concerning the constitutionality of House Bill #332 which relates to the discipline of students in

Idaho's public schools. The bill specifically provides for the development and adoption of discipline codes by the public school districts and more fully sets forth the rights and responsibilities of school district personnel with regard to student discipline and control.

In reviewing the provisions of H.B. #332, it should be noted and perhaps emphasized that school districts and their functions are the creations of the legislature which exercises plenary power in such matters. *Electors of Big Butte Area v. State Board of Education*, 78 Idaho 602, 308 P.2d 225 (1957). Consequently, while discipline and control of students generally have been thought to be a matter of local school board policy, the enactment of H.B. #332 at least in concept surely is a proper exercise of legislative power. Indeed, similar statutes have been upheld by courts in other jurisdictions addressing the matter. See, e.g., *Sims v. Waln*, 536 F.2d 686 (6th Cir. 1976). However, we do think it necessary to address each section of the bill separately in an effort to clearly delineate the constitutional parameters within which such legislation must be considered.

Section 1 of H.B. #332 amends *Idaho Code* §33-205 to allow teachers to temporarily remove any pupil from the classroom in order to control or maintain discipline. Clearly, the administration of such a disciplinary action falls within the authority of the state and the school district to control activities in the classroom and to prescribe methods of endorsement of disciplinary regulations. Indeed, the United States Supreme Court has repeatedly emphasized and confirmed the comprehensive authority of the states and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct of students in the schools. *Tinker v. Des Moines School District*, 393 U.S. 503 (1968). Furthermore, in light of the fact that this disciplinary action may result in a temporary absence from the educational process, the constitutionality of this provision is only enhanced by the additional requirement set forth in the legislation that procedures be developed for such a removal which must conform with minimal requirements of due process of law. See, *Strickland v. Inlow*, 519 F. 2d 744 (8th Cir. 1975).

Sections 2, 3 & 4 of H.B. #332 in essence require the development and adoption and training in the implementation of discipline codes to govern the conduct of students in the public schools. It would appear that the development of such codes is not a prerequisite to action taken to maintain discipline nor is it necessary at least constitutionally to save those enforcement procedures set forth in *Idaho Code* §33-205. However, we would suggest that the course of action represented by these sections certainly is a desirable practice and would produce a helpful tool both for school district personnel and students of the district. *Melton v. Young*, 328 F. Supp. 88 (1971).

Section 5 of the legislation may, however, present a question of constitutional magnitude and warrants careful analysis. That section authorizes a local school board of trustees to reassign any student who assaults an employee of the district. It further provides that any expenses resulting from any reassignment of such a student to a different building in the district or any tuition arising from the transfer of such a student to another district shall be paid by the parent or guardian of the student. It is this latter portion of the section with which we must be concerned in analyzing the constitutionality of this particular provision.

Article 9, Section 1 of the Constitution of the State of Idaho provides in relevant part that it is the duty of the legislature of Idaho to establish and maintain a general, uniform and thorough system of public, free common schools. In implementing such a mandate Idaho statutes appear to contemplate that students are entitled to a free public education only in the district in which they legally reside. In those cases where a student, upon the application of his/her parent or guardian, desires to attend a school in other than the home school district, the parent or guardian is liable for the payment of tuition. See *Idaho Code* §§33-1402 and 33-1406. However, in those instances where a transfer of a student to a school in other than the home school district is made by initiative of the home district upon its determination that such a transfer is in the best interests of the child, the home school district is responsible for the payment of tuition. *Idaho Code* §§33-1403, 33-1406. It therefore would appear that it was the contemplation of the legislature that its constitutional mandate to provide a free public education encompasses those instances where a transfer of a student to other than the home district is made upon initiative of the home board of trustees. Clearly, the language of §33-516 as proposed in H.B. #332 requires that tuition arising from the transfer of a pupil to another district upon initiative of the home board of trustees be paid by the parent or guardian of the pupil. While we recognize that the reason for such a transfer arises from the assault of a school district employee by a student, a circumstance probably not within the contemplation of *Idaho Code* §§33-1403 and 33-1406, we nevertheless must suggest that such a provision may in fact violate the legislature's mandate to provide a free public education.

Perhaps by way of footnote to the above discussion, a similar problem may arise with regard to the requirement set forth in Section 5 that the parent or guardian of any student who has assaulted a school district employee pay expenses which have resulted from the reassignment of such student to a different building in the district. It is at least arguable that the assessment of such expenses constitutes a charge on attendance at the school and thereby contravenes the constitutional mandate that schools be free. See, *Paulson v. Minidoka County School District No. 331*, 93 Idaho 469, 463 p. 2d 935 (1970).

We can find no constitutional infirmities with Section 6 of the legislation which authorizes and apparently mandates the school district to reimburse or compensate employees of the district for personal injuries or damage to property sustained under particular circumstance set forth in the section. Nor does Section 7 which amends *Idaho Code* 33-1216 to provide employees "assault" leave in addition to any sick leave to which the employee is entitled appear to be violative of the Idaho Constitution. Such provisions are not of the nature of a local or special law prohibited by Article 3, §19 of the Constitution of the State of Idaho and their enactment clearly falls within the plenary power of the legislature with regard to the creation and functions of the public school districts.

Finally, Section 8 of H.B. #332 provides that an employee of any school district may use such force as is reasonably necessary to protect the employee, other employees of the district or students of the district from an assault or an attempted assault. This section appears to be a statutory codification of the well recognized common law tort principle that when a person has reasonable grounds to believe he/she or another person is about to be attacked, he may use such force as is reasonably necessary for protection against the potential injury. Indeed, it has been held that where reasonable physical contact is necessary to prevent a student from inflicting possible damage to property or

injury to another student, a teacher has the responsibility to take necessary reasonable action in exercise of his/her supervisory duty. *Shorba v. Board of Education*, 59 Haw. 388, 583 p. 2d 313 (1978). We therefore confirm the constitutionality of this section of the legislation.

In summary, with the exception of Section 5 the provisions of H.B. #332 appear to be constitutionally sound. We would advise, however, that the language of Section 5 may in fact violate the legislature's constitutional mandate to provide a free public education and therefore warrants careful legislative scrutiny.

Very truly yours,
/s/ STEVEN W. BERENTER
Deputy Attorney General

SWB/ms

April 2, 1981

Mayor Farrell Larsen
City of Montpelier
534 Washington Street
Montpelier, Idaho 83254

**THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION,
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE**

Re: Planning and Zoning Commission Residency Requirement

Dear Mayor Larsen:

You have asked us whether appointees to the City Planning and Zoning Commission must meet the five year residency requirement contained in the Local Planning Act, §67-6504(a), *Idaho Code*. It is our opinion that anyone who serves on a local planning and zoning commission must have resided in the county for a period of not less than five years prior to the date of appointment.

Section 67-6504(a) contains the requirements for membership on a local planning and zoning commission. That section states that:

An appointed member of a commission *must* have resided in the county for five (5) years prior to his appointment, and *must* remain a resident of the county during his service on the commission. (Emphasis added.)

The word "must" has been held to be mandatory rather than discretionary. 50 Am. Jur. 1st Stat. §28. Therefore, the local government has no choice but to comply with the clear mandate of the Act. Further support for this position is found in the case law which holds that the words of a statute must be given their usual, plain and ordinary meaning and words that are in common use should be given the same meaning in the statute that they have among the great mass of people who are expected to read, obey and uphold the statute. *Nagel v. Hammond*, 90 Idaho 96, 408 P.2d 468 (1965); *Higginson v. Westergard*,

100 Idaho 687, 604 P.2d 51 (1979). Webster's defines "must" as an obligation or duty.

The only way a person who had not been a resident of the county for five years prior to an appointment to the Planning and Zoning Commission could serve lawfully thereon is if that person had been appointed to the commission prior to the adoption of the Local Planning Act. Section 67-6504, *Idaho Code*, specifically recognizes as duly constituted those planning and zoning commissions existing prior to the enactment of the Act. Therefore, someone appointed to the Planning and Zoning Commission prior to the adoption of the Act who lived in the county less than the five years required under the Act, could nonetheless continue to serve on the commission until the expiration of their term. This would be considered a "grandfather clause". Realistically, however, that section would have no effect on your present Planning and Zoning Commission. The Local Planning Act was adopted in 1975 and this is 1981. Six years have passed since the adoption of the Act and anyone who had been appointed to a Planning and Zoning Commission prior to that adoption would have met the residency requirements by now. Therefore, no one possibly could exist today who would need to be "grandfathered in" under those provisions.

For the above stated reasons, it is our opinion that in order to lawfully serve on a Planning and Zoning Commission duly constituted under the Local Planning Act, a person must have resided in the county for five years prior to his appointment. Persons residing in the county for a period less than five years are not eligible for appointment to a local planning and zoning commission.

Sincerely,
/s/ ROBIE G. RUSSELL
Deputy Attorney General
Chief, Local Government Division

April 3, 1981

The Honorable Morgan Munger
Representative, District 9
Ola, Idaho 83657

**THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION,
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE**

Dear Representative Munger:

You have asked on behalf of a constituent whether a "naturopathic physician" could legally practice "naturopathy" as defined in RS6807, even though the Legislature did not enact RS6807 or previously proposed legislation which would have provided for the practice of naturopathy. It is assumed the individual does not hold a license to practice medicine.

The relevant RS definition of naturopathy includes the diagnosis and treatment of human conditions. The Idaho Medical Practice Act requires that any person who holds himself out to the public as qualified and willing to diagnose and treat human conditions must hold a license to practice medicine.

The Idaho Supreme Court held in *State v. Maxfield*, 98 Id. 356, 564 P.2d 968 (1977) that naturopaths are not exempted from the requirements of the Medical Practice Act merely because they refer to what is legally medical practice as "naturopathy". In summary, one cannot change the legal nature of medical practice merely by calling it something else.

For these reasons, I advise that a "naturopathic physician" would be precluded by Idaho law from practicing naturopathy as defined in RS6807.

Very truly yours,
/s/ LARRY K. HARVEY
Chief Deputy Attorney General

LKH/nt

April 6, 1981

Honorable John V. Evans
Governor
State of Idaho
Statehouse Mail

Re: House Bill 388-Energy Unit Developments

**THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION,
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE**

Dear Governor Evans:

You have asked whether HB 388, relating to Energy Unit Developments under the Local Planning Act, Chapter 65, Title 67, *Idaho Code*, is mandatory, i.e., if geothermal energy is discovered upon a given piece of property must the county commissioners allow development?

Based upon a careful reading of the bill, the Local Planning Act, and general rules of statutory construction, it is our opinion that HB 388 as written would require mandatory allowance of development if usable geothermal energy existed upon the property.

ANALYSIS:

House Bill No. 388, as passed by the First Regular Session, Forty-Sixth Legislature of the State of Idaho, amends the Local Planning Act, Chapter 65, Title 67, *Idaho Code* by adding a new section 67-6515A which would add "Energy Unit Developments" (EUDs) to the Act. It is assumed that EUDs are the same as Planned Unit Developments (PUDs) with the addition of a geothermal energy requirement.

PUDs are provided for in §67-6515, *Idaho Code*. Generally speaking, they are comprehensive developments which include residential, commercial, industrial and other uses much like the construction of a whole community from scratch. In keeping with the Act's emphasis upon local control, §67-6515 is written in a permissive rather than directory form; local governments "may provide", "may define", "may include". Although PUDs are included within

the Act, they are voluntary, not mandatory. If a local government does not wish to include PUDs among its zoning ordinances, it is not required to do so.

HB 388, on the other hand, is written in directory language. It states that "... energy unit developments in rural areas of any county *shall be* allowed ..." (emphasis added). The bill contains other commanding language: "shall include", "must be used", "is allowed". The word "shall" when used in a statute, is mandatory. *Goff v. H.J.H. Co.*, 95 Idaho 837, 421 P.2d 661 (1974). It must be concluded that by using directory language, the legislature intended to require counties to allow development if geothermal energy was present.

Another rule of statutory construction requires a reading of the whole act and any amendments thereto in order to put the proposed statute or amendment in proper perspective. *State v. Groseclose*, 67 Idaho 71, 171 P.2d 863, (1946). The Local Planning Act contains both directory and permissive language. For example, §67-6508, entitled "Planning Duties", states that "It *shall be* the duty of the planning or planning and zoning commission to conduct a comprehensive planning process . . ." (emphasis added). This language has been held to require the adoption of a comprehensive plan as a condition precedent to the validity of a zoning ordinance. *Dawson Enterprises, Inc. v. Blaine County*, 98 Idaho 506, 567 P.2d 1257 (1977). Since the court has previously ruled that similar language in the same act is directory, it follows that the same language in an addition to the act will also be interpreted as directory.

Finally, the goal in interpreting any statute is to ascertain legislative intent. *State of Idaho ex rel. Andrus v. Kleppe*, 417 F. Supp. 873 (D.C. Idaho 1976); *Jorstad v. City of Lewiston*, 93 Idaho 122, 567 P.2d 318 (1969). Although an examination of minutes or journals has not been had, the Legislative Council reports that it was the sponsor's intent to make the bill directory rather than permissive.

In summary, we are of the opinion that HB 388 as written is directory.

Sincerely,
/s/ ROBIE G. RUSSELL
Deputy Attorney General
Chief, Local Government Division

April 14, 1981

L. G. Sirhall, Chairman
Idaho Industrial Commission
Statehouse
Boise, Idaho 83720

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION,
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Dear Mr. Sirhall:

This responds to the request of the Commission for an interpretation of *Idaho Code* §72-319(4). You have specifically asked us to render our opinion as

to whether the Industrial Commission has the power to waive, reduce or negotiate penalties found pursuant to this statutory section.

Idaho Code §72-319(4) provides:

Any employer required to secure the payment of compensation under this law, who wilfully failed to do so, shall be liable to a penalty for each day during which such failure continues of two dollars (\$2.00) for each employee, and in cases where the employer is a corporation and is unable to pay the fine, any officer or employee of the corporation, who had authority to secure payment of compensation on behalf of the corporation and wilfully failed to do so, shall be liable for a like penalty, to be recovered for the time during which such failure continued, but not more than three (3) consecutive years in any action brought by the commission in the name of the State of Idaho; any amount so collected shall be paid into the industrial administration fund; *for this purpose the district court of any county in which the employer carries on any part of his trade or occupation shall have jurisdiction.*

The above underlined portion of the relevant statute indicates that the district courts of this state are the entities empowered with levying and assessing the civil penalty contemplated by the statute. The statute, by its very terms, does not empower either the Industrial Commission, or the district courts of the state to waive, reduce or otherwise negotiate the statutorily contemplated penalty.

It is an uncontroverted rule of law that statutes imposing penalties are subject to strict construction:

Statutes imposing penalties are likewise subject to this rule of strict construction; they will not be construed to include anything beyond their letter, even though it may be within their spirit, and the courts are not permitted, in cases dealing with penalty statutes, to attribute inadvertance or oversight to the legislature when enumerating the classes of persons who are subject to a penal enactment, nor to depart from the subtle meaning of words or phrases in order to bring within the supposed purview of the statute, persons not named or distinctly described therein. 36 Am. Jur. 2d, *Forfeitures and Penalties*, §8.

Applying the rule of strict statutory construction to *Idaho Code* §72-319(4), it is clear that it was the intent of the legislature to empower only the judicial branch of government, through the district courts of the state, to levy the penalty contemplated by the statute. Accordingly, only the district courts are statutorily authorized to determine whether an individual's or business association's actions fall within the prescribed ambit of *Idaho Code* §72-319. From the terms of the section itself, the Industrial Commission is only empowered to institute the necessary proceedings to bring the matter before the court. Absent any specific statutory authority to waive, reduce or negotiate the penalties, we believe that under a rule of strict statutory construction, the administering executive branch agency, that is to say, the Industrial Commission, has no legal authority to waive, reduce or negotiate the penalties contemplated in Section 72-319(4). The only authority statutorily granted to the Commission is to make a determination as to whether or not litigation should be commenced to attempt to judicially enforce the penalty provision.

If we may be of further assistance in this or any other matter, please do not hesitate to contact this office.

Very truly yours,
/s/ ROY L. EIGUREN
Deputy Attorney General
Division Chief — Legislative/
Administrative Affairs

RLE/t

April 21, 1981

Sam Nettinga
Director
Department of Labor and Industrial Services
Statehouse Mail

Re: Applicability of prevailing wage laws to construction of health facilities

**THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION,
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE**

Dear Mr. Nettinga:

You have asked us whether exemptions from construction and bidding requirements contained in §39-1459, *Idaho Code* would also relieve the state or its subdivisions from meeting the prevailing wage requirements set forth in Title 44, Chapter 10, *Idaho Code*.

It is our opinion that the state and its subdivisions are exempt from the prevailing wage law requirements when applied to health facilities construction pursuant to §39-1459.

Section 44-1001, *Idaho Code*, requires that:

In all state, county, municipal, and school construction, repair and maintenance work under any of the laws of this state the contractor, or person in charge thereof. . . must further pay the standard prevailing wages in effect as paid in the county seat of the county in which the work is being performed;. . .

The statute was passed in 1933 and subsequently amended in 1935 and 1939. Section §39-1441, et. seq., the Idaho Health Facilities Authority Act was passed in 1972. The expressed intent of the act is to provide money for the construction of health facilities in the state. The money is to be lent by the health facilities authority to health institutions for the purpose of constructing, reconstructing, or repairing of existing or new facilities. Section §39-1442 further provides that the act shall be liberally construed.

While the act does not specifically mention §44-1001 or prevailing wage laws, it does provide an exemption from construction and bidding requirements for public buildings. Section §39-1459 states that:

The facilities are not subject to any requirements relating to public buildings, structures, grounds, works, improvements imposed by the laws of this state or any other similar requirements which may be lawfully waived by this section and any requirement of competitive bidding or other restriction imposed on the procedure for award of contracts for such purpose or the lease, sale or other disposition of property of the authority is not applicable to any action taken under authority of this act. (Emphasis added).

Since the prevailing wage law discussed in §44-1001 applies specifically to state, county, municipal and school construction and since any construction accomplished pursuant to the Health Facilities Act would be state or local construction, it is our opinion that §39-1459 exempts the construction of state health facilities from the prevailing wage law.

Although there appears to be no inherent conflict between the two statutes, if there were, rules of statutory construction provide that the latter expression of legislative intent would prevail. 2A, Sands, *Sutherland Statutory Construction*, §51.02 (4th Ed. 1973). In this case the Health Facilities Act was passed years after the prevailing wage law and therefore would take precedence.

Sincerely,
/s/ ROBIE G. RUSSELL
Deputy Attorney General
Chief, Local Government Division

April 24, 1981

Paul D. Veasy, Esq.
Hopkins, French, Crockett & Springer
Post Office Box 1219
Idaho Falls, Idaho 83401

Re: City of Challis

**THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION,
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE**

Dear Mr. Veasy:

You have asked us whether the City of Challis' acceptance of plant construction in lieu of development fees amounts to an "expenditure" as defined by §50-341(b), *Idaho Code*, thereby necessitating competitive bids or whether such conduct would amount to "loaning of credit" pursuant to Article 8, Section 4, Idaho Constitution.

According to your recent letter, subsequent telephone conversations, and a meeting with Representative Ray Infanger, the City of Challis is experiencing rapid growth due in large part to the proposed increase in mining activity in Custer County. A major mining company involved with increased production is Cyprus Mines Corporation which proposes to construct a large housing development in the area of city impact outside the Challis city limits. Part of this development would include construction of a sewer system to service the new

residents. The present Challis sewage treatment plant cannot handle any more households, although it is not operating at full design capacity. This is due to an infiltration problem which has substantially lowered useable capacity. Cyprus proposes to repair the existing facility to cure the infiltrate problem and thereby restore design capacity. This will allow hookup of the new households in the Cyprus Development to the existing Challis sewage treatment facility.

The City of Challis has responded to the astronomical growth problem and accompanying demand for city services by instituting development fees. These fees are to be charged against developers to offset costs incurred by the city for increased city services, including sewers. In return for expanding the useable capacity of the treatment plant at no expense to the city, Cyprus desires a waiver of the development fees that normally would be charged.

Your first question is whether such a waiver amounts to a loan of the city's credit since the fee would be charged in the future. Our answer is no; such a waiver is not a loan of credit so long as the treatment plant does not become subject to any lien by contractors or materialmen.

Article 8, Section 4 prohibits cities, among others, from lending or pledging their credit in aid of private endeavors. More succinctly put, cities are prohibited from creating a relationship of borrower and lender with a private concern. *Bannock County v. Citizens Bank and Trust Company*, 53 Idaho 159 (1933). In this instance the city is not aiding a private endeavor since the work to be done is on the city's own sewage treatment plant. Furthermore, there is no lending or pledging of credit since the city does not propose either to advance any funds to the developer nor obligate itself to repay any debt either by bond or otherwise. The city is merely agreeing to accept work on the city's sewage treatment facilities in lieu of development fees. Since the city incurs no indebtedness nor loans any money it is our opinion that such conduct is not a violation of Article 8, Section 3 or Section 4, Idaho Constitution.

However, the city must be careful not to allow the attachment of any liens by contractors or materialmen on city owned property. Such action has been found to be a loaning of the city's credit under Article 8, Section 4, *Boise-Payette Lumber Company v. Challis Independent School District No. 1*, 46 Idaho 403 (1928).

Your second question is whether the acceptance of plant construction in lieu of development fees amounts to an expenditure as defined by §50-341(b), *Idaho Code*, thereby necessitating competitive bids. The word "expenditure" as defined by the statute means "the granting of a contract, franchise, or authority to another by the city in every manner and means whereby the city disburses funds;" In this case the city has not obligated itself to disburse funds nor is it disbursing funds. It has merely agreed to accept work in lieu of development fees. Such conduct does not appear to fit within the definition of expenditure contained in the statute. It is therefore our opinion that the city's conduct in this matter does not require the letting of competitive bids.

We might suggest that if there is still concern on the part of local authorities about the nature of the conduct of this matter that the city council pass a resolution declaring an emergency pursuant to §50-3401(1), *Idaho Code*. That section provides that in the event of "a great public calamity [such] as an extraordinary fire, flood, storm, epidemic or other disaster. . ." that the city

council may pass a resolution declaring that the public interest and necessity demand the immediate expenditure of public money to safeguard life, health or property. Such a finding of fact and resolution would relieve the city from the necessity of following the competitive bid laws. We think there is ample evidence to indicate that such public calamity does exist.

If you have further questions concerning this or any other matter do not hesitate to call upon us.

Sincerely,
/s/ ROBIE G. RUSSELL
Deputy Attorney General
Division Chief
Local Government Division

April 24, 1981

Mr. Dale W. Storer
Assistant City Attorney
Post Office Box 220
Idaho Falls, Idaho 83401

Re: Applicability of Uniform Building Code to State Buildings

**THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION,
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE**

Dear Mr. Storer:

You have asked us to provide you with information as to the authority of the City of Idaho Falls to enforce its building and fire codes in various public buildings owned or controlled by the state or its subdivisions, in light of the case of *Caesar v. State*, 101 Idaho 158, 610 P.2d 517, holding that Boise's Uniform Building Code did not apply to Boise State College or the State of Idaho. You list seven categories: state owned universities or vocational technical schools; private non-profit foundations, created by the Regents of the University of Idaho; Idaho State Building Authority buildings; Public Health Districts; buildings leased by the State of Idaho or any official department, board, commission, etc. from private individuals; public school districts; and county owned buildings. You have also asked whether a city, such as Idaho Falls, may enter into agreements with such entities whereby the city would assume responsibility for inspection of code violations in these buildings and, if so, could the city enforce the city's codes against such entities.

We have tried to deal with each of your questions. There are, however, most certainly numerous particular situations where the statements made in this letter will not cover the jurisdictional questions you have raised. Such cases are too numerous to be dealt with here and should be considered as they arise. We have tried to add cautionary notes in regard to a few of these situations, such as the University of Idaho Board of Regents and Charter School Districts. Also, many complex and unusual situations have arisen in the state in regard to federal funding of particular projects in which cases there may be enforcement of fire and building codes by either federal, state, municipal authorities or even possibly joint control.

Cases from other states on the jurisdictional questions involved here must be treated with some caution because of the difference in the constitutions and laws of the various states. For instance, some cases follow a very broad "home rule" policy. Others do not. There has been considerable argument in the past as to whether or not Idaho is a "home rule" state. See *Moore*, Powers and Authorities of Idaho Cities: Home Rule or Legislative Control, 14 Idaho Law Review, 143. *Cesar v. State*, 101 Idaho 158, 610 P.2d 517, 519, 520, speaks of this matter and concludes that, to a great extent, the legislature controls municipalities, even though cities have certain constitutional powers.

ANALYSIS

A number of previous opinions of this office have dealt with the applicability of local codes such as the fire and building codes to the State of Idaho, Chapters 35 and 41, Title 39, *Idaho Code*. Opinion No. 75-77, dated November 6, 1975, advised that Boise State University and the State Board of Education were not subject to city ordinances as to building codes, building permits and planning and zoning. Shortly thereafter the legislature amended the Local Planning Act to make the state subject to city planning and zoning regulations under §67-6528, *Idaho Code*. Opinion No. 77-37, dated June 10, 1977 advised that the State of Idaho is not required to obtain building permits from cities or counties prior to commencing construction projects but that it is required to obtain approval of local planning and zoning commissions as to building plans and specifications and is required to obtain special use permits where applicable. In Opinion No. 76-9 dated January 29, 1976, we advised that under Chapter 41, Title 39, *Idaho Code*, the Idaho Building Code Advisory Act, the Department of Labor and Industrial Services does not retain jurisdiction to enforce building and fire codes where a local government has opted to enforce its own local ordinances on the subject, but that the Department of Labor and Industrial Services does retain jurisdiction to check plans of such buildings for compliance with the codes.

A. State owned universities, colleges and vocational technical schools.

The State Board of Education, §§33-101, 33-107 and 33-122, *Idaho Code*, which is also the Board of Vocational Education under §33-2202, *Idaho Code*, and the Board of Regents of the University of Idaho under §33-3301 et seq., *Idaho Code*, has control of the universities, colleges and vocational technical schools within the State. The schools are, under the above cited statutes, state institutions and a part of state government. The holding in *Caesar v. State*, *supra*, related directly to Boise State University and would also apply to the other institutions. Since the holding in that case, §67-2304, *Idaho Code*, has been changed somewhat and moved to §§67-5711, *Idaho Code*. However its general affect is the same as it was under the old statute.

All state owned buildings except some of those constructed by the University of Idaho are constructed through the Permanent Building Fund Council, §§67-5711-13, *Idaho Code*. These buildings are not subject to city building or fire code ordinances, *Caesar v. State*, *supra*, but would probably be subject to local zoning and planning regulations. Also see the opinions listed herein.

It should be noted that the Board of Regents of the University of Idaho, who govern the University of Idaho, are a special case. The Board of Regents is a chartered preconstitutional body recognized under Article 9, Section 10, Idaho Constitution. *Miller v. State Board of Education*, 56 Idaho 210, 52 P.2d 141. We

believe that the University of Idaho would not be controlled by city ordinances and the result would be much the same as in the *Caesar v. State* case, *supra*, since they are constitutionally recognized.

B. Private non-profit foundations created by the Regents of the University of Idaho.

As above indicated, the University of Idaho is a special case. The University was chartered before statehood in 1889 by the 15th and Final Session of the Idaho Territorial Legislature, at page 17 thereof. The charter and institution were recognized in the Idaho Constitution, Article 9, §10; *Miller v. State Board of Regents*, *supra*. However, you are concerned with private nonprofit foundations such as the University of Idaho Foundation, Inc., which is a non-profit corporation organized and existing under the older Chapter 10, Title 30, *Idaho Code*, and the new Chapter 3, Title 30, *Idaho Code*. In other words, these organizations would generally be incorporated entities or business corporations. They are legal entities formed for pursuing private purposes and as such they have obligations, rights and duties similar to those of real persons and are considered at law as "persons". 1 Fletcher's *Cyclopedia of Corporations*, §§24-40. *Payette Lakes Protective Association v. Lake Reservoir Company*, 68 Idaho 111, 189 P.2d 1009; *Anderson v. First Security Bank*, 54 F. Supp. 937; *State v. Cosgrow*, 63 Idaho 278, 210 P.393. We believe that such entities would clearly fall within the definition of "persons" at §39-4105(4), *Idaho Code*, and that as such the Building Code Advisory Act would apply to them. Section 39-4111, *Idaho Code*, requires any "person", including corporations, to comply with the Uniform Building Code Advisory Act or the applicable city ordinances as the case may be.

C. Idaho State Building Authority.

In Idaho, a number of cases have held that the legislature may, by statute, set up "independent public bodies, politic" or quasi-public entities. *Board of County Commissioners v. Idaho Health Facilities Authority* 96 Idaho 498, 531 P.2d 588; *Boise Redevelopment Agency v. Yick Kong Corporation*, 94 Idaho 876, 499 P.2d 575; *State ex rel. Williams v. Musgrave*, 84 Idaho 77, 730 P.2d 778; *Wood v. Boise Jr. College Dormitory Housing Commission*, 81 Idaho 397, 342 P.2d 700; and *Lloyd v. Twin Falls Housing Authority*, 62 Idaho 592, 113 P.2d 1102. These cases, and others, hold that such entities are valid independent single purpose public agencies, not a part of state or local government. On the road to establishing the independent quasi-public agencies, there have been a number of failures, such as: *State Water Conservation Board v. Enking* 56 Idaho 722, 58 P.2d 779; *Village of Moyie Springs v. Aurora Manufacturing Company*, 82 Idaho 337; 353 P.2d 767; *General Hospital v. City of Grangeville*, 69 Idaho 6, 201 P.2d 750; and *O'Bryant v. City of Idaho Falls*, 78 Idaho 313, 303 P.2d 672. In these cases for one reason or another, it has been held that the formation of the entities was invalid or that some action they had taken was invalid.

The Idaho State Building Authority (ISBA) has been the subject of three opinions, 76-35, 76-39 and 77-49. Generally, we are of the belief that the ISBA is a valid public agency existing outside of state government. There is little question under the case law that independent public quasi-corporations, may be created by the legislature. Within their limited fields of operation, they have most of the attributes of private corporations.

The ISBA must gain approval from the Idaho Legislature before it acts, §67-6410, *Idaho Code*, and is exempt from taxation, §67-6412, *Idaho Code*. Otherwise it acts independently from state government, just as a private corpo-

ration does. See §67-6423, *Idaho Code*. The ISBA is not subject to laws inconsistent with its authority, §67-6424, *Idaho Code*. It is allowed to bargain and contract with municipalities and counties as to planning and zoning and the furnishing of buildings for use by the state, §67-6411, *Idaho Code*. This section certainly implies that the ISBA is subject to and must follow some municipal or county ordinances.

The ISBA has, in past operations, always obtained a building permit before erecting a structure. Inspection for fire and building safety is one of the basic parts of any municipal or county fire or building ordinance. We believe that by consistently obtaining building permits before building, the ISBA has, in effect, recognized that it is subject to such local regulations, that such local regulations do not conflict with its law, and that it is not exempt from those requirements under §67-6424, *Idaho Code*. We therefore believe, based upon the past actions of the ISBA and its statutory authority that, through the construction stage, the buildings built and held by the ISBA are subject to local building and fire codes.

The preceding discussion applies only to the construction stage of ISBA buildings. After the buildings are constructed, they are turned over to the Department of Administration at the date of substantial completion, §67-5708, *Idaho Code*. Section 67-2312, *Idaho Code*, provides that the Department of Administration is to manage the buildings for the state. In such cases the Idaho Industrial Commission and the Department of Labor and Industrial Services are required by statute to inspect for unsafe or hazardous conditions all public buildings "owned or maintained" by the state. The buildings would not be subject to local fire and building code inspection, §67-2312, 2313, *Idaho Code*, but are subject to any rules adopted by the Permanent Building Fund Council. See *Caesar v. State*, *supra*. Such buildings would therefore not be subject to local fire and building code inspection after construction is completed and the buildings are turned over to the State.

D. Public Health Districts.

In 1970, the Legislature established the health districts, Chapter 90, page 218, 1970 Idaho Session Laws. In 1975, in analyzing that law, this office concluded that the health districts were state governmental agencies, Opinion No. 38-75. Then, in 1976 the legislature, in reaction to that opinion, amended the law, Chapter 179, §1, pages 645, 664, 1976 Idaho Session Laws. See §§39-401, et seq., *Idaho Code*. The 1976 Amendments to the Health District Law made radical changes in the structure of the districts, changing them from state agencies to public entities or public quasi-corporations. The action and intent of the legislature is clearly stated in the present §39-401, *Idaho Code*, which states that the various health districts are not a single department of state government, nor are they any part of the twenty departments of state government. They are to operate and be recognized not as state agencies or departments, but as governmental entities whose creation has been authorized by the state much in the manner of other single purpose districts. This would place the seven health districts in the same category with the Idaho State Building Authority. Health districts should comply with local ordinances as to buildings and fire codes in relation to the buildings they themselves built and occupy.

E. Private Buildings leased to the State.

The fifth category of buildings you ask about are those buildings leased to the State of Idaho or any official department, board, commission or agency by

private individuals or corporations. We believe that they would be subject to either local ordinances or to the Idaho Building Code Advisory Act, as the case may be. If the state is merely a tenant with no maintenance responsibilities, the building would be subject to local ordinances since they are privately owned. If, however, the state has the duty to "maintain" such buildings, under §67-2312, *Idaho Code*, the Industrial Commission and the Department of Labor and Industrial Services would do the inspection and the state codes followed by them would be used. In those cases the state would preempt local ordinances.

F. Public School Districts.

The school districts are required to follow the safety codes set out in §31-4109, *Idaho Code*, by the State Board of Education, Idaho State Board of Education Building Regulations, G29-3.1.1; I16-3.1; I13-2.1; N9-3.1 and M132.02.2.1 and 2. See §§33-2209 and 33-116 and 33-122, *Idaho Code*.

Independent school districts are a special case. They are charter districts organized and formed before statehood. They are not subject to many state laws and there is some question as to whether they would be subject to local inspection for building or fire code ordinances. They may be subject to the regulations of the State Board of Education, although, to this writer's knowledge, there is no case law on the subject.

G. County Owned Buildings.

The case of *Strickfadden v. Greencreek Highway District*, 42 Idaho 738, 248 P. 564, 49 A.L.R. 1057, is one of the leading cases in the nation as to classification and distinctions between municipalities, quasi-municipal corporations and counties. It held that counties are "true public corporations" and that they are "legal political subdivisions of the state" organized on a local basis to carry on certain functions of state government.

The state controls state affairs and local ordinances which would be in conflict with state law usually give way to the state law. 2 *McQuillin* on Municipal Corporations, 4.84, to 4.95. This doctrine is followed in the case of *Caesar v. State*, *supra*. See also *Moore*, Powers and Authorities of Idaho Cities, Home Rule or Legislative Control?, 14 Idaho Law Review 43; *Voyles v. City of Nampa*, 97 Idaho 597, 548 P.2d 1217; *Taggart v. Latah County*, 78 Idaho 199; 298 P.2d 979; *State v. Poynter*, 70 Idaho 438, 220 P.2d 384; and *State v. Musser*, 67 Idaho 214, 176 P.2d 199.

The courts of the state and consequently the courthouses, relate to a definite state function. The state is vitally concerned in regard to carrying on court procedure. In the case of *Denver v. Bossie*, 266 P. 214, 83 Colo. 329, it was held that a building which was to be used as a courthouse in a city, concerned state matters rather than city matters. In that case, the building was being constructed for the City of Denver, a home rule city, but would also be used as a courthouse for county and state business. The court, on rehearing, concluded that because county and state court would be held in the building, it concerned state matters not local matters and that state law would control. This case supports our belief that the construction of a courthouse or jail concerns a state matter rather than a local one, and that state laws would apply rather than local ordinances or regulations. See 2 *McQuillin on Municipal Corporations*, §485 and §495. Whether this means that Chapter 41, Title 39, *Idaho Code*, the

Idaho Building Code Advisory Act, would apply or that §§67-2312 and 67-2313, *Idaho Code*, would apply or that the inspection is to be done by the state to the exclusion of the city has not been decided so far as this writer can determine. The Department of Labor and Industrial Services believes that §44-104, *Idaho Code*, applies to these cases.

In regard to your last question as to cooperative enforcement between various governmental agencies, we believe that a city may enter into an agreement with other governmental entities for building and fire code inspection pursuant to §§63-2326 through 67-2333, *Idaho Code*. These sections provide generally for such agreements and cooperation between various governmental agencies. In this regard attention should be called to §67-2333, *Idaho Code*, which states that the act is not to be construed as changing the powers of an agency.

Sincerely yours,
/s/ WARREN FELTON
Deputy Attorney General
Local Government Division

May 1, 1981

Thomas G. Nelson, Esq.
Post Office Box 1906
Twin Falls, Idaho 83301

Re: Bellevue Charter

**THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION,
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE**

Dear Mr. Nelson:

You have asked us "whether, under the provisions of Article 12, Section 1 and Article 12, Section 2 of the Constitution of the State of Idaho the rules and regulations of the Idaho Board of Health and Welfare and the guidelines of the South Central Health District apply in the City of Bellevue so as to restrict the city's power to permit utilization of building units with individual septic tanks on lots smaller than the minimum required by the guidelines?"

It is our opinion that although the duly adopted regulations of the State Board of Health probably apply, the "guidelines" of the South Central Health District as they pertain to minimum lot sizes for septic tanks do not apply within the City of Bellevue, Idaho.

ANALYSIS:

The City of Bellevue, Idaho, operates under a special charter granted by the Idaho Territorial Legislature in 1883. That charter and those of other cities preexisting the State were recognized in Article 12, Section 1 of the Idaho Constitution. The Idaho Supreme Court has consistently held that Article 12, Section 1 "did not attempt to change or abrogate special charters of cities already

incorporated, or to provide that said special charter cities should be taken out from under their special charters or the laws under which they were then operating, . . .” *Bagley v. Gilbert*, 63 Idaho 494, 500 (1942).

The *Bagley* case is of particular importance in Idaho because it announces the general rules of law that apply to charter cities and to matters of “local concern.” “The rule would seem to be well settled in this jurisdiction that the provisions of a special charter such as granted to the City of Boise supersede and prevail over any inconsistent provisions contained in the general laws pertaining to matters of a *local concern* [However] . . . When the legislature declares a matter to be of *general state concern* and declares a public policy with respect thereto such general state law will prevail over any special city charter provisions to the contrary.” *Bagley v. Gilbert, supra, Caesar v. State*, 101 Idaho 158, 610 P.2d 517 (1980) (Emphasis added). *Hoffer v. Lewiston*, 59 Idaho 538 held that “general acts do not ordinarily repeal the provisions of charters granted municipal corporations, unless such repeal is in express language or by necessary implication.” Based upon the preceding, it is necessary to find that the South Central Health District “guidelines” are of “statewide concern” in order to put them within the rule.

Matters of health and sanitation, including sewage disposal, are of statewide concern as to which the state is supreme over its municipalities and may impose duties and responsibilities upon them as agencies of the state. *Michelson v. Grand Island*, 154 Neb. 654, 48 N.W.2d 769, 26 A.L.R. 2d 1346; 2 *McQuillin Mun. Corp.* §4.99, 56 Am. Jur. 2d, *Mun. Corps.* §132. A distinction should be drawn here between what are matters of “health concern” and what are merely the mechanical aspects of dealing with sewage. Although the establishment of laws pertaining to matters of health and sanitation are of a statewide concern, the general management, construction and so forth as it pertains to the mechanical aspects thereof is generally held to be a matter of local concern. *Mix v. Board of County Commissioners*, 18 Idaho 695 (1910), 2 *McQuillin Mun. Corp.* §4.99.

The general statutory authority for the State Department of Health and Welfare is found in Title 39, *Idaho Code*. Although many of the statutes contained therein are general in nature they do provide specific authority for the Department of Health, its Director and Board, to establish rules and regulations, codes or standards for the “general supervision of the promotion and protection of life, health, mental health and environment of the people of the state”, §39-105(3), *Idaho Code*. Section 39-105(3) (k), invests the Director of the Department with the authority for “The supervision and administration of a system to safeguard the quality of the waters of this state, including but not limited to the enforcement of standards relating to the discharge of effluent into the waters of this state and the storage, handling and transportation of solids, liquids and gases which may cause or contribute to water pollution.” This is apparently a general grant of authority to establish rules and regulations pertaining to sewage and sewage treatment.

Section 39-118, *Idaho Code*, entitled “Review of Plans” provides that “all plans and specifications for the construction of new sewage systems, sewage treatment plants, or systems, other waste treatment or disposal facilities, public water supply systems or public water treatment systems . . . shall be submitted to and approved by the Department of Health and Welfare before construction may begin and all construction shall be in compliance therewith.” These two sections read together provide clear authority for the State Depart-

ment of Health and Welfare to establish rules and regulations regarding sewage. Since septic tanks are a form of sewage treatment and disposal, they would logically fall within the definitions of these sections.

The Department of Health and Welfare has adopted regulations pursuant to its statutory authority which delineate specific requirements for the treatment of sewage. The regulations are quite detailed and comprehensive in nature. Title 1, Chapters 3 and 15 of those regulations deal specifically with septic tanks. Although they detail methods of construction and specific requirements relating thereto, they contain no minimum lot size requirements for septic tanks.

Section 50-1326, *Idaho Code*, provides a means whereby the Department may enforce its rules relating to water and sewage. The section provides that no plat shall be filed that does not have a sanitary restriction endorsement. In order to get the endorsement, the owner of the land subject to the proposed plat must submit to the State Board of Health all necessary information relating to plans and specifications for the proposed water and sewage facilities. The Department must then approve those facilities before the restriction is endorsed so that the plat may be filed. The statute specifically provides that the approved plans and specifications relate to "individual water and/or sewage facilities for the particular land" as well as public water and sewer facilities. The regulations and specifications which the Department enforces pursuant to the sanitary restriction are those discussed above. Again, no minimum lot size requirement for septic tanks is contained therein.

Title 39, Chapter 4, *Idaho Code* contains the statutory authority for the public health districts of which the South Central Health District is one. Section 39-401, *Idaho Code*, expresses the legislative intent that "health districts operate and be recognized not as state agencies or departments". However, §39-414(1) directs the district Board of Health to "administer and enforce all state and district health laws, regulations and standards". Subparagraph 2 requires the Board to "do all things required for the preservation and protection of the public health in preventative health and such other things delegated by the Director of the State Department of Health and Welfare . . ." It is apparent that although the health districts are not state agencies, they probably act as agents of the State Department of Health and Welfare when they enforce state regulations.

Section 39-416, *Idaho Code*, establishes the mechanism by which the district Board of Health may adopt, amend or rescind regulations, rules and standards. It provides specifically that "before such rules and regulations shall become effective, they must be approved by the State Board of Health and Welfare within one hundred and twenty (120) days after the submission to the State Board." The statute further provides that "every rule, regulation or standard adopted, amended or rescinded by the District Board shall be done in a manner conforming to the provisions of Chapter 52, Title 67, *Idaho Code*, [Administrative Procedures Act] and the rules and regulations promulgated thereunder by the State Board of Health and Welfare." Nowhere in §39-4116 are "guidelines" mentioned. Furthermore, according to Jack Hockberger, Deputy Attorney General, Environmental Division, Department of Health and Welfare, the "guidelines" of the South Central Health District as they relate to subsurface sewage disposal have not been submitted to nor approved by the State Board of Health. An examination of the guidelines submitted with your letter indicates that the guidelines were adopted pursuant to the authority

granted in Title 39, Chapter 4, *Idaho Code*, to the South Central District Board of Health. No mention is made of whether or not such adoption complied with the provisions of the Administrative Procedures Act.

Based upon the foregoing, it is our opinion that:

1. The duly adopted regulations of the State Department of Health and Welfare are probably matters of statewide concern and therefore would apply within a charter city. The regulations, of course, must deal with matters that are of a statewide concern. If they become special laws that apply only in one particular area it may invade the province of local concerns and not be applicable. However, that must be determined on a case by case basis.

2. A review of the rules and regulations of the State of Idaho Department of Health and Welfare indicates that although the state has detailed regulations concerning the construction and placement of septic tanks those regulations contain no minimum lot size requirement. Absent any such requirement, the city is free to establish its own regulations relating thereto.

3. A review of the statutory authority of the State Board of Health and Welfare reveals no basis whereby the state may regulate the conduct of these matters within the limits of a city absent duly adopted rules and regulations pertaining thereto.

4. The statutory authority granted to the health districts provide specific formal procedures for the adoption of rules and regulations by the District Health board. The guidelines at issue here apparently have not been adopted according to the procedures outlined in §39-416, *Idaho Code*, and could be invalid.

5. Section 39-416, *Idaho Code*, provides for the adoption of "regulations, rules and standards". The statute nowhere provides for the adoption of "guidelines" nor for the enforcement thereof. "Guidelines" are defined as "an indication or outline of future policy or conduct", Webster's 3rd International Dictionary. They therefore probably carry the weight of rules and regulations and may not be enforceable as such.

6. Finally, since the guidelines are those of the South Central Health District and not those of the State Department of Health and Welfare they are probably not matters of "statewide concern". Therefore, pursuant to the previously cited case authority they would not be applicable within the confines of a charter city.

In summary then, it is our opinion that the "guidelines" of the South Central District Health Department as they pertain to minimum lot sizes for the construction of septic tanks are not applicable within the city limits of the City of Bellevue, Idaho. However, in the final analysis only the courts can finally determine whether any particular matter is of local or statewide concern.

Sincerely,
/s/ ROBIE G. RUSSELL
Deputy Attorney General
Division Chief
Local Government Division

May 21, 1981

Honorable Darwin L. Young
Representative, District 27
Route 5, Box 99
Blackfoot, Idaho 83221

Re: Local Planning Act Requirements

**THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION,
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE**

Dear Representative Young:

You have asked whether the commissioners must change the comprehensive plan if they change a zoning ordinance promulgated thereunder and what procedures they must follow to do so. You have also asked whether the county commissioners may issue conditional building permits which specify certain conditions that must be met before the permit has full force and effect.

Section 67-6511, *Idaho Code*, provides for the adoption, amendment or repeal of zoning ordinances. The procedures outlined therein first require that a proposed change in a zoning ordinance be submitted to the Planning and Zoning Commission. If, after proper notice and hearing the commission finds that the request is in accordance with the comprehensive plan, they may recommend to the governing board that the change be adopted or rejected pursuant to the notice and hearing procedures provided in §67-6509, *Idaho Code*. If a boundary change is involved, notice by mail must be made to all land owners within three hundred feet of the external boundaries of the land being considered. Publication must also be made pursuant to §37-715, *Idaho Code*. If the proposed amendment is inconsistent with the comprehensive plan, the plan itself must be amended. Pursuant to the same two-stage notice and hearing procedures outlined in §67-6509, the changes in the comprehensive plan must take place before the zoning ordinance in question is amended.

You have indicated that the commissioners propose to change an agriculture zone to some form of industrial designation. It would therefore be our opinion in light of the above cited statutes, that the proposed change would probably require a change in the comprehensive plan. It would therefore be necessary for the proposed changes to be submitted to the planning and zoning commission and then to the commissioners with the attendant hearings before any changes could be made in the zoning ordinances. It might be possible to combine the comprehensive plan and the zoning change hearings into one hearing at each stage of the process, so long as there is adequate public notice.

Your second question is more difficult and does not have an easy answer. What your letter envisions is some form of conditional or contract zoning. That is, that the governing body would enter into an agreement with the developer that in trade for the change in zoning and the granting of the building permit, that the developer would build according to certain standards. This zoning approach has not found favor in the law since contract zoning could amount to an unconstitutional trading away of the discretionary authority of the governing body or a denial of equal protection of the laws since each developer would be treated differently according to an agreement reached with the governing board.

The safer approach requires the establishment of specific performance standards in zoning ordinances prior to the granting of any building permits. These may be accomplished either by a zoning ordinance containing specific performance standards and designated uses or through the adoption of a Planned Unit Development Ordinance which would allow for some negotiation of specific requirements so long as overall standards were maintained. Since we do not know exactly what your present zoning ordinance and comprehensive plan contain, we can only offer generalized advice.

Section 67-6509, *Idaho Code* contemplates the very things with which your letter is concerned. For instance, §67-6508(d) requires "an analysis of the uses of rivers and other waters, forests range, soils, harbors, fisheries, wildlife, minerals, thermal waters, beaches, watersheds and shorelines" in developing the comprehensive plan. Section 67-6511, lists standards which may be considered in adopting a zoning ordinance. The two major requirements are that the zoning district shall be in accordance with the adopted comprehensive plan and that all standards shall be uniform for each class or kind of building throughout each district. However, standards may differ from one district to another. The standards to be considered are outlined in §67-6518, which contemplates such things as water systems, sewer systems, storm drainage systems and the like. That statute indicates that the standards may be provided as part of a zoning, subdivision, planned unit development or a separate ordinance adopted, amended or repealed, in accordance with §67-6509. Permits issued pursuant to the Local Planning Act, §67-6519 must be measured against already established standards. It is therefore necessary in light of due process and equal protection requirements to establish standards by which proposed developments may be judged prior to granting or denying building permits.

It would be our recommendation in light of the preceding discussion that the planning and zoning commission and the governing body establish specific standards to be met and embody those in an ordinance prior to making any changes in the present ordinances and comprehensive plan. This will assure a well thought out approach before the permit stage is reached.

Sincerely,
/s/ ROBIE G. RUSSELL
Deputy Attorney General
Division Chief
Local Government Division

June 9, 1981

The Honorable Richard Adams
State House of Representatives
Star Route, Box 28
Grangeville, Idaho 83530

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION,
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Dear Representative Adams:

This is in response to your letter of May 8, 1981, in which you request legal guidance concerning the negotiation process for public school districts and

their professional employees. You have specifically sought guidance with regard to the legislative intent of *Idaho Code* §33-1271 which provides in relevant part that joint ratification of all final offers of settlement shall be made in open meetings.

In order to respond to your questions, it is necessary to consider the very nature of the ratification process for settlement offers reached through negotiations. It is a well recognized principle of labor relations that the term "ratification" generally implies the process by which formal approval of a potential settlement agreement is obtained from those members of the organization or legislative body affected. For example, in the context of teacher negotiations, ratification of a settlement offer by a local education organization is usually accomplished by a vote of the members of the organization. Similarly, ratification by a local school board of trustees would be effected by a vote of its members taken in open meeting pursuant to the Idaho Open Meeting Law, *Idaho Code* §§67-2340 et seq.

With this in mind, we are given guidance in ascertaining the intent of the legislature in its enactment of *Idaho Code* §33-1271. Given that the concept of ratification usually connotes action taken by each party, it is doubtful that the legislature intended by its use of the term "joint ratification" to require a process by which approval of a settlement by the members of each party involved in negotiations is accomplished through some form of joint action in a common meeting. Indeed, reference to well-recognized rules of statutory construction designed to aid in the determination of legislative intent provides solid support for such a conclusion. The Idaho Supreme Court has held that a standard of reasonableness may be used in interpreting ambiguous language of a statute. *Summers v. Dooley*, 94 Idaho 87, 481 P.2d 318 (1971). Furthermore, in construing a statute, it is necessary to consider the consequences that might flow from a particular interpretation. *Smith v. Department of Employment*, 100 Idaho 520, 602 P.2d 18 (1979). A construction of the term "joint ratification" in a manner which would require action to be taken by both parties jointly or action to be taken separately by the parties but at a common meeting simply would not appear to be a reasonable interpretation of the statute in light of the somewhat chaotic circumstances which could result. Furthermore, such a construction would impede the completion of the negotiations process and conflict with recognized preceptions concerning the concept of ratification in the field of labor relations.

It does appear, however, that the term "joint ratification" is susceptible of two different instructions for each of which persuasive arguments can be developed. Arguably, the legislature could have intended by the use of such language that once each party to the negotiations had ratified a settlement offer, completion of the ratification process would require some form of acknowledgement of such by both parties jointly in an open meeting. Indeed, such an interpretation would be reasonable in light of its consequences with regard to the implementation of this provision. However, in construing such a term, the language of *Idaho Code* §33-1271 must be read in its entirety and its meaning determined in light of the purpose and intent of the statute. In so doing, it is our conclusion that a different result may be reached.

It would appear that the purpose of this statute is to at least in part expose that negotiating process to members of the public in an effort to better inform citizens of matters which could have a direct affect on their welfare. As you may know, language of this section provides not only that joint ratification be

made in open meetings but that accurate records and minutes of negotiation sessions be kept and available for public inspection at the offices of the board of education during normal business hours. With this in mind, we are given guidance as to the intent of the legislature in its use of the term “joint ratification” and the requirement that such be made in open meetings. Indeed, it is our conclusion that given what appears to be the legislative purpose of this section, it was the intent of the legislature in its use of the term “joint ratification” to require that ratification of a settlement offer by the school district and the local teachers’ association, albeit separate and apart, be made in open meetings.

Support for such a construction finds expression in our consideration of the intent and purpose of §33-1271. Certainly a requirement that ratification by both parties involved in the negotiation process be made in open meetings furthers the legislative desire to facilitate the public’s interest in being informed. Indeed, any other construction of this language, for example that referred to above where joint ratification would be construed to require mere acknowledgement of ratification by both parties in open meetings, simply would accomplish little in terms of what appears to be the legislative purpose underlying the language of §33-1271 and would merely represent a pro forma action of little substance or meaning.

It is still necessary, however, to consider the meaning of the term “open meetings” with regard to the ratification process contemplated by §33-1271. It is clear that action by a local board of trustees to ratify or otherwise approve a settlement offer must be taken pursuant to Idaho’s Open Meeting Law, *Idaho Code* §§67-2340 et seq. That act provides in relevant part that while labor negotiations may be conducted in executive session, any final action, of which ratification may be characterized, must be made in compliance with those provisions which ensure the open nature of the meeting. Notice must be given of the meeting in which ratification is to take place, the action may not be taken by secret ballot and written minutes of the meeting must be taken and subsequently made available to members of the public. In essence, members of the public must be given a meaningful opportunity to attend the meeting and observe the implementation of the ratification process by the governing body of the local school district.

The meaning of the term “open meetings” with regard to ratification of a settlement by a local teachers’ association is not nearly so clear and indeed the ramifications of such a requirement warrant careful consideration. A local teachers’ association as a private entity does not constitute a public agency for purposes of the Open Meeting Law and therefore does not fall within the purview of the Act. Consequently, we are given little guidance as to what might be required of an association to comply with a mandate that ratification of a settlement offer be made in an open meeting. It would only seem reasonable that while it probably was not the intent of the legislature to require full compliance with the letter of the Open Meeting Law, we would suggest that such a requirement of open meetings would require of an association those steps which would ensure compliance with the spirit of the act. In essence, we would conclude that it was the intent of the legislature that such meetings be open to the public and that adequate notice be given of such meetings to provide the public with a meaningful opportunity to attend.

Such a requirement, however, imposed on a private organization such as a teachers’ association raises questions of constitutional magnitude and therefore warrants further analysis. We are very much concerned that an “open

meetings” mandate would infringe upon or at least chill association members’ freedom of speech and association as protected by the 1st and 14th amendments of the Constitution of the United States. Although case law addressing these types of issues has generally been in the context of restraints on first amendment interests of labor unions, it is clear, albeit by analogy, that the activities of a teachers’ association do fall within the purview of 1st amendment protection. However, we must point out that the freedom of association is not absolute and may be subject to governmental regulation under appropriate but limited circumstances. *Buckley v. Valeo*, 424, U.S. 1. Indeed, courts addressing the legal propriety of restraints of 1st amendment interests of public employees generally use a balancing test where the rights of the public employees to freely express opinions and to associate in matters of public concern are weighed against the competing interests of the state. *Pickering v. Board of Education*, 391 U.S. 563 (1968). Furthermore, it appears that the regulation or restraint must be a precisely drawn means of furthering a substantial state interest. *Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York*, _____ U.S. _____ (1980). With these tests in mind, persuasive arguments could be developed that an open meetings requirement imposed on a teachers’ association should not be sustained. Arguably, the state’s interest in an informed public is outweighed by the potential chilling effect such requirement would have on a teacher’s freedom of speech and association. Furthermore, it is possible that less restrictive alternatives could be developed to further the state’s interest which would have less adverse impact on the rights of those teachers affected. Indeed, it would seem that the state’s interest in an informed public is afforded in the debate and ratification of a settlement offer by the school board of trustees at a public meeting as required by the Open Meeting Act. Finally, persuasive argument can be developed that such a requirement may infringe upon the public employees’ right to “bargain collectively” as guaranteed by Chapter 12, Title 33 of the *Idaho Code*. See, e.g., *Bassett v. Braddock*, 262 So. 2d 425 (Fla. 1972).

In summary, it would appear that an open meetings requirement for ratification of a settlement offer by a local teachers’ association as apparently required by *Idaho Code* §33-1271 infringes upon members’ freedom of speech and association and their right to “bargain collectively” as set forth in *Idaho Code*. We therefore would suggest that such a requirement may not withstand judicial scrutiny.

Sincerely,
/s/ STEVEN W. BERENTER
Deputy Attorney General
Education

SWB/ms

July 8, 1981

Representative Linden B. Bateman
District 31
Idaho House of Representatives
Statehouse
Boise, Idaho 83720

**THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION,
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE**

Dear Representative Bateman:

You have inquired concerning the proper interpretation of article 3, §6 of the Idaho Constitution. This provision states:

No person shall be a Senator or Representative who, at the time of his election, is not a citizen of the United States, and an elector of this state, nor anyone who has not been for one year next preceding his election an elector of that county or district whence he may be chosen.

Specifically, you have asked whether the legislature may by statute impose a requirement that a person be at least twenty-one years of age in order to be elected to the state legislature. As you know, *Idaho Code* §34-402 requires that a person be at least eighteen years old in order to be a qualified elector. The essence of your question, therefore, is whether the legislature may set a more stringent standard for qualification for election to the Idaho Legislature than that imposed by the Idaho Constitution.

Such requirements have generally been found to be a valid exercise of legislative authority. Although there is no Idaho case specifically dealing with a situation such as this, *Boughton v. Price*, 70 Idaho 243, 215 P.2d 286 (1950) dealt with a question which is similar in principle. In that case, an Idaho district court judge challenged *Idaho Code* §1-2007 which stated that judges could not run for election after they had attained the age of seventy years. Similarly, article 5, §23 of the Idaho Constitution sets forth qualifications for serving as district judge:

No person shall be eligible to the office of District Judge unless he be learned in the law, thirty (30) years of age, and a citizen of the United States, and shall have resided in the State or territory at least two (2) years next preceding his election, nor unless he shall have been at the time of his election, an elector in the Judicial District in which he is elected.

The court upheld the imposition of the additional qualification concerning age, stating that "The legislature possesses all legislative power and authority, except in such instances and to such extent as the Constitution of the State and of the United States have imposed limitations and restraints thereon." (70 Idaho at 251.) Accordingly, the court found that since no specific constitutional provision had been violated, the statute was valid.

The court in *Boughton v. Price* based its rationale also on its conclusion that article 5, §23 did not appear to "be all inclusive or to limit the power of the Legislature to prescribe additional reasonable qualifications." Courts in other

states have applied this rationale to cases involving age qualifications for legislators which are more stringent than qualifications set by state constitutions. See *Menglecamp v. List*, 88 Nev. 542, 501 P.2d 1032 (1972), and *Stafford v. State Election Board*, 203 Okla. 132, 218 P.2d 617 (1950). See also 90 ALR 3rd 900; 34 ALR 2nd 155; and 63 Am. Jur. 2nd, Public Officers and Employees, §46.

Although other cases in other states have reached different conclusions, they have done so based upon constitutional provisions distinct from article 3, §6. Those provisions have generally been interpreted to be the sole prescription of qualifications for legislative office. Because article 3, §6 is virtually identical in form to article 5, §23, it is probable that an Idaho court would interpret it as well to be a limitation rather than a sole grant of authority to set qualifications for holding public office.

Parenthetically, it should be noted that although several cases have attempted to show that statutes similar to *Idaho Code* §34-614 in some way violate the United States Constitution, in no case has such a violation been found. (See generally the authorities cited above.) It would appear, therefore, that the legislature has the authority to exercise its sound discretion in enacting reasonable qualifications for election to the state legislature in addition to those contained in the Idaho Constitution.

If I can be of any further service, please contact me.

Sincerely,
/s/ KENNETH R. McCLURE
Deputy Attorney General
Division Chief — Legislative/Administrative Affairs

KRM/b

July 10, 1981

The Honorable Rusty Barlow
House of Representatives
Statehouse
Boise, Idaho 83720

**THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION,
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE**

Dear Representative Barlow:

You have asked for a legal opinion concerning the constitutionality of House Bill No. 4. Specifically, you are concerned if this bill falls within the provisions of the governor's call, as required by article 4, §9 of the Idaho Constitution. As you know, House Bill No. 4 amends *Idaho Code*, §34-614 to provide two changes. The first would change the age requirement to serve as a legislator from 21 years to 18 years of age. The second would add language to clarify how long a legislator must live in his district prior to the election in order to be validly elected.

Article 4, §9 of the state constitution allows the governor to call the legislature into special session. In pertinent part, it states that the legislature "... shall have no power to legislate on any subjects other than those specified in the proclamation" by which the governor has convened the legislature. The proclamation issued by Governor Evans on June 18, 1982, calling the legislature into extraordinary session on July 7, 1981, specifies among other things, that the legislature may "... consider and enact legislation making such further revisions in the election laws of the State of Idaho *as may be required as a result of said redistricting and reapportionment.*" (Emphasis added)

This particular clause of article 4, §9 has not been specifically interpreted by the Idaho Supreme Court. However, similar provisions in the constitutions of other states have been studied by other courts. These courts have consistently taken the language at face value and applied it strictly, with the result that any legislation which is not specifically contemplated in the governor's call for special session must be void. See *Burciaga v. Shea*, 187 Colo. 1978, 530 P.2d 508 (1974); *State Tax Commission v. Preece*, 1 Utah 2d 337, 266 P.2d 757 (1954); *Martin v. Riley*, 20 Cal. 2d 28 123 P.2d 488 (1942); *State ex rel Conway v. Versluis*, 58 Ariz. 368 120 P.2d 410 (1941) and *In re Plat*, 16 Nev. 296, 108 P.2d 858 (1940).

Given the clear mandate of article 4, §9 and the strict interpretation of similar provisions by other courts, it would appear that that portion of House Bill No. 4 which changes the age of qualification to serve as a legislator from 21 to 18 does not fall within the scope of the governor's call, and, therefore, would be invalid if enacted. That portion which clarifies the requirement period for residency before a legislator is elected would appear to be necessary in that it would determine who may or may not be elected to represent the newly created districts. It would appear, therefore, that his provision would be valid.

If I can be of any further service to you, please contact me.

Sincerely,
/s/ KENNETH R. McCLURE
Deputy Attorney General
Division Chief — Legislative/
Administrative Affairs

KRM/b

July 13, 1981

Mr. John Fairchild, Chairman
Payette County Commissioner
Payette, Idaho 83661

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION,
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Re: Bond Requirement for Dissolution of District

Dear Mr. Fairchild:

You have asked us whether the bonding requirements of §31-4304 which apply to an election for the formation of a recreation district, also apply to a corresponding dissolution of the district election pursuant to §31-4320 *Idaho Code*. It is our opinion that the reference to §31-4304 contained in §31-4320 refers only to §31-4304(d), and not to the rest of the statute. Therefore, no bond would be required for an election to dissolve the district.

In order to determine the application of §31-4320, it is first necessary to compare it with §31-4304 because §31-4320(c) provides:

If the county commissioners order an election as provided in this section, such election shall be conducted and notice thereof given as nearly as practicable in accordance with the provisions of §31-4304 of this act.

It is important to note that the reference to §31-4304 is not contained in §31-4320(a). Subsection (a) refers to the requirements for putting the dissolution measure on the ballot. Likewise, subsection (a) of §31-4304 refers to the requirements for putting the creation measure on the ballot. Subsection (b) of §31-4320 essentially tracks subsection (c) of §31-4304 and refers to the validation of the petition by the county commissioners.

There is, however, one significant difference. In §31-4304(c) the language refers to the "refunding" of the cash deposit if the petitioners' vote fails. No such refund is referred to in §31-4320(b). The important inference of this omission is that the legislature intended to omit the bonding requirement of those who wish to dissolve a recreation district. This inference is strengthened by the fact that in §31-4320 there is no provision which tracks the language of §31-4304(b), the subsection which requires the posting of a bond prior to an election creating a recreation district.

Finally, the reference to §31-4304 contained in §31-4320 refers only to the "conduct" and "notice" of the election. Section 31-4304(d) is the only subsection contained in §31-4304 which specifically refers to the "conduct" and "notice" which are required. Thus "conduct" and "notice" are not broad enough to include the bonding requirement within their narrow purview. Consequently, we are of the opinion that a bond need not be posted in order to dissolve a recreation district pursuant to *Idaho Code* §31-4320.

Sincerely,
/s/ ROBIE G. RUSSELL
Deputy Attorney General
Chief, Local Government Div.

CC: Ben Ysursa
Office of Secretary of State

July 17, 1981

The Honorable Patricia McDermott
House of Representatives
Statehouse
Boise, Idaho 83720

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION,
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Dear Representative McDermott:

You have asked whether RS 7334, a proposed bill to amend certain sections of the *Idaho Code* to provide for a special election for referenda, falls within the scope of the governor's call for an extraordinary session. On June 18, 1981, the governor issued a proclamation calling the legislature into extraordinary session. Although the principal purpose of this extraordinary session is to consider legislation for reapportionment and redistricting, Item No. 3 of the governor's proclamation charges the legislature "to consider and enact legislation making such further revisions in the election laws of the State of Idaho *as may be required as a result of said redistricting and reapportionment.*" Idaho Constitution, article 4, §9 states that during a special session the legislature "shall have no power to legislate on any subjects other than those specified in the proclamation." Accordingly, if the proposed legislation is not "required as a result" of reapportionment or redistricting, it may not be considered during this special session.

While the proposed RS 7334 may not appear to fall within the scope of the governor's call in the abstract, it is my conclusion that the RS is probably an acceptable subject for legislation when viewed in context, as legislation which is necessary to allow a referendum on the reapportionment or redistricting plans enacted, before they are actually implemented at the next general election. This is so because *Idaho Code* §34-1803 currently allows referenda only at regular biennial elections. If a referendum is to be delayed until the next general election, the entire legislature may be elected according to an apportionment plan which the people reject at the same time.

Accordingly, although it cannot be said with complete certainty, it would seem that the legislature is justified in determining that this change in the election laws is "required as a result of reapportionment or redistricting." Although such a determination may be subject to some doubt, Idaho courts are required to construe a legislative act to be constitutional if such an interpretation is reasonable. See *Idaho Gold Dredging v. Balderston*, 58 Idaho 692 78 P.2d 105 (1938). Finally, courts are very reluctant to intrude into the reasonable determinations of constitutional officers and bodies of the state when such determinations appear reasonable. See *Moon v. Investment Board*, 96 Idaho 140, 525 P.2d 335(1974), and *Diefendorf v. Gallet*, 51 Idaho 619 10 P.2d 307 (1932). For the above reasons it is my conclusion that RS 7334 is probably within the scope of the governor's call, in this instance, and is a proper subject for legislation.

If this office can provide further assistance to you in this or any other matter, please contact me.

Sincerely,
/s/ KENNETH R. McCLURE
Deputy Attorney General
Division Chief — Legislative/
Administrative Affairs

KRM/bc

July 21, 1981

John Andreason
Director
Legislative Fiscal Office
Statehouse Mail

Re: Request by Vernon K. Brassey for opinion on selective release of holdback funds.

**THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION,
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE**

Dear Director Andreason:

The Idaho Supreme Court has ruled that the prerogative to appropriate monies from the state treasury is exclusively vested with the legislative branch of government pursuant to Idaho Constitution, article 7, §13. *In re Huston*, 27 Idaho 231, 147 Pac. 1064 (1915); *Jackson v. Gallet*, 39 Idaho 382, 228 Pac. 1068 (1924); *Herrick v. Gallet*, 35 Idaho 13, 204 Pac. 477 (1922); *McConnell v. Gallet*, 31 Idaho 386, 6 Pac. 142 (1931). The exclusive power of the legislature to appropriate monies from the state treasury is succinctly summarized by a noted legal treatise as follows:

Authority of law is necessary to an expenditure of public funds. As a rule, money cannot be drawn from the treasury of a state except in pursuance of a specific appropriation made by law. The power of the legislature with respect to the public funds raised by general taxation is supreme, and no state official, not even the highest, has any power to create an obligation of the state, either legal or moral, unless there has first been a specific appropriation of funds to meet the obligation. 63 Am. Jur. 2d *Public Funds* §45.

The most recent expression by an Idaho court of precisely what constitutes an “appropriation” as contemplated by Idaho Constitution, article 7, §13 is found in *Leonardson v. Moon*, 92 Idaho 796, 451 P.2d 542 (1969). The Supreme Court defined an appropriation as (1) authority from the legislature (2) expressly given, (3) in legal form, (4) to public officers, (5) to pay from public monies, (6) a specified sum and no more, and (7) for a specified purpose, and no other.

Idaho Constitution, article, 2, §1 prevents the exercise of powers granted to one branch of state government by another branch. The Idaho Supreme Court has interpreted this constitutional article as precluding the legislative branch of government from delegating any of its constitutional functions to any other

body or authority, including the executive branch of government. *Boise Redevelopment Agency v. Yick Kong Corp.*, 94 Idaho 876, 499 P.2d 575 (1972); *Idaho Savings and Loan Ass'n. v. Roden*, 82 Idaho 128, 350 P.2d 255 (1960). As a consequence, the legislature may not delegate any portion of its power that can be legally defined as a part of the "appropriation" process.

As a general rule of law, the executive branch of government is not vested, in the absence of statutory or constitutional authorization, with the right to alter appropriations, or to exceed the limits set by the legislature. Then the executive is strictly confined in the exercise of such power to the precise authority given. *State v. Moore*, 40 Neb. 854, 59 N.W. 755 (1894); *State v. Erickson*, 75 Mont. 429, 244 P. 287 (1926); see generally 81A C.J.S. *States*, 232. Both the federal and state judiciaries have repeatedly ruled that the executive branch cannot reduce or otherwise prevent the expenditure of legislatively appropriated monies absent a constitutional or statutory authorization to do so. *State Highway Comm. v. Volpe*, 479 F.2d 1099 (8th Cir.); *West Side Org. Health Services v. Thompson*, 73 111. App. 3d 179, 391 N.E.2d 392 (1979); *Oneida County v. Berle*, 398 NYS 2d 600 (N.Y. 1978); see generally 27 A.L.R. *Fed Executive Impoundment of Funds* §124. However, the courts have held that when there exists the authority for the executive to reduce legislatively made appropriations, such authorization does not violate the constitutional separation of powers doctrine, since *the reduction by the executive of a previously enacted legislative appropriation is not a part of the appropriation process itself*. (Emphasis Added)

The Idaho Legislature has vested the executive branch of government with the power to alter an appropriation. The authorization so granted is limited solely to the power to reduce appropriations made by the legislature. The relevant authority is found in Idaho Code §67-3512, which in its entirety states:

Reduction of appropriations — Any appropriation made for any department, office of institution of the state (including the elective officers in the executive legislative and judicial departments and the state board of education) may be reduced in amount by the *state board of examiners* upon investigation and report of the administrator of the division of budget, policy planning and coordination; provided, that before such reduction is ordered the head of such department, office or institution shall be allowed a hearing before said board of examiners and may at such hearing present such evidence as he may see fit. No reduction of appropriations shall be made without hearing unless and until the head of such department, office or institution shall file his consent in writing thereto. (Emphasis Added.)

The above articulated statute clearly evidences a statutory authorization to the executive branch to reduce a previously enacted legislative appropriation. As the case authority cited above suggests, the executive may reduce or otherwise prevent the expenditure of legislatively appropriated monies only if there exists the proper authority to do so. Such authority will be strictly construed. On the basis of the above authority in *Idaho Code* §67-3512, the board of examiners does have the power to reduce appropriations previously made by the legislature. See Attorney General Opinion No. 80-20.

In addition, *Idaho Code* §67-3512 does not contain any implicit limitations requiring uniform reductions. Absent such legislative direction, while unequal

reductions for each department, office or institution may appear to be a quasi-budgeting process, it is distinguishable, and expressly authorized by statute.

We hope this information may be of assistance. If we may assist further in this or any other related matter, please contact us at your convenience.

Yours Truly,
/s/ JOHN ERIC SUTTON
Deputy Attorney General
Chief, State Finance Division

JES/jci

August 10, 1981

The Honorable Jim S. Higgins
House of Representatives
State of Idaho
Box 234
New Meadows, ID 83654

**THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION,
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE**

Dear Representative Higgins:

You have asked this office whether House Bill 318 (1981 Session Laws C. 90) authorizes the Water Resources Board to finance hydro power projects through the sale of revenue bonds.

Prior to the passage of HB 318, the Idaho Water Resource Board had authority under *Idaho Code* §42-1734(h) and (s) to issue revenue bonds to finance the construction of "water projects." See *Idaho Water Resource Board v. Kramer*, 97 Idaho 535, 548 P.2d 35 (1976). A water project is generally defined as a project which puts water to a beneficial use or uses, such as irrigation, recreation, hydropower production, and domestic use. *Id* at 546. However, under *Idaho Code* §42-1734(m), the Board needed legislative approval prior to issuing revenue bonds for a water project it wished to build, and under *Idaho Code* §42-1756(c) (7), prior legislative approval was needed before the Board could loan an amount exceeding \$500,000 to a local sponsor of a water project.

HB 318 both amended the existing statutes and added new ones. *Idaho Code* §42-1734(x) was added, which eliminated the requirement of legislative approval for loans made to local water project sponsors from the proceeds of a sale of revenue bonds. *Idaho Code* §42-1740, which described the purpose for which revenue bonds may be sold, was amended and a new purpose was added — the rehabilitation and repair of existing irrigation projects and facilities. As amended, the statute retained the original purpose: to finance the construction, maintenance, repair and operation of water projects. *Idaho Code* §42-1740 now reads:

42-1740. PURPOSES. All revenue bonds authorized under the terms of this act may be issued and sold from time to time and in such

amounts as is deemed necessary to provide sufficient funds for carrying out all its powers and, without limiting the generality thereof, shall include the following: *rehabilitation and repair of existing irrigation projects and irrigation facilities*, and construction maintenance, repair and operation of water projects, engineering and other costs for investigation and promotion of water projects, fiscal and legal expenses, cost of issuance of bonds including printing and advertising expenses, the establishment of bond reserves, and payment of interest on bonds.

The statute's designation of two purposes of revenue bonding is consistent with the amendment of I.C. §42-1734(s) by HB 318, to include an authorization for the Board to issue revenue bonds both for water projects and for the rehabilitation and repair of existing irrigation projects and facilities:

42-1734. POWERS AND DUTIES. The Board shall, subject to the provisions of chapter 42, title 67, *Idaho Code*, have the following powers and duties:

. . .

(s) To issue revenue bonds for the *rehabilitation and repair of existing irrigation projects and irrigation facilities and for water projects*, pledge any revenues available to the board to secure said bonds, exclusive of any revenues from one or more projects constructed, *financed* or operated by the board, or *existing irrigation project or facilities rehabilitated or repaired by the board*;

. . .

A significant change to the above statute was the addition of "financed" on the sixth line. The addition authorizes the Board to issue revenue bonds and pool the resultant revenues for water projects which the Board itself constructs or operates, *or one which the Board finances*. Thus, *Idaho Code* §§42-1734(s), 42-1740 and 42-1734(x) authorize the Board to issue revenue bonds and loan the proceeds to sponsors of local water projects and to entities intending to repair or rehabilitate existing irrigation facilities.

The repeated use of the term "water project" in the Board's enabling legislation provides the focus for determining whether HB 318 permits the Board to fund a project which will produce hydroelectricity. As previously stated, a water project is a facility which applies water to a beneficial use — be it irrigation, hydropower, recreation, or other beneficial uses. *Idaho Water Resource Board v. Kramer, supra*. HB 318 did not delete "water project" from any portion of the Board's enabling legislation; in fact, *Idaho Code* §42-1734(x), which was added by House Bill 318, uses the term "local water project sponsor." With respect to passing statutory amendments, the legislature must be presumed to have known what was the law under the existing statute and its interpretation by the courts. *First American Title Co. of Idaho, Inc. v. Clark*, 99 Idaho 10, 576 P.2d 581 (1975). Provisions introduced by an amendatory act must be read in unison with the provisions of the original act that were left unaffected by the amendments. *Lawless v. Davis*, 98 Idaho 175, 560 P.2d 497 (1977). HB 318 pre-

served the Board's existing ability to fund water projects, and consequently hydropower facilities, while adding a new purpose for the issuance of revenue bonds, namely, the repair and rehabilitation of existing irrigation facilities.

Although there appears to have been considerable confusion among the representatives concerning the applicability of HB 318 to hydro projects at the time of its passage, the language is clear. Accordingly, a court would probably not look beyond its face in determining its effect. This is so because there is no occasion for further inquiry where the language of the statute is unambiguous. *State v. Riley*, 83 Idaho 346, 362 P.2d 1075 (1961). It would appear, therefore, that HB 318, when read in conjunction with existing statutes, authorizes the Board of Water Resources to sell revenue bonds to finance hydro projects.

Very truly yours,
/s/ KENNETH R. McCLURE
Deputy Attorney General
Division Chief — Legislative/
Administrative Affairs

KRM/bc

cc: Howard Carsman

August 26, 1981

Mr. Lawrence Rigby
Superintendent
Joint School District No. 150
P. O. Box 947
Soda Springs, ID 83276

**THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION,
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE**

Dear Mr. Rigby:

This is in response to your letter of June 30, 1981, in which you request legal guidance concerning the scope of a school board's authority to determine the location for the district's graduation ceremonies. It is my understanding that your question arises in light of concerns raised by patrons of your district concerning the Board's decision to hold such ceremonies in church facilities in the community.

In order to respond to your request, it is necessary to first consider the scope of a local school board's authority as it pertains to activities such as the holding of graduation ceremonies. It would appear that the Board does in fact have the authority to determine the location for the district's graduation ceremonies. Such a conclusion finds support in our consideration of the very nature of a graduation exercise. I would suggest that a graduation ceremony represents an event provided by the Board of Trustees in honor and for the benefit of graduating students. Consequently, the Board may structure the ceremony as it deems appropriate, a power which would encompass a determination of where and when such a ceremony is to take place.

Furthermore, pursuant to *Idaho Code* §33-506 and §33-512 local school boards have been granted broad authority to set policy, rules and regulations for the governance of the school districts. Certainly a decision as to where graduation exercises are to be held would be a decision, the making of which is necessary for the governance of the district. I, therefore, would conclude that such a decision would fall within the purview of such authority and is thereby confined to the discretion of the local school board of trustees.

While it therefore would appear that at least in the abstract a local school board does in fact have the exclusive authority to determine the location of the district's graduation ceremony, this authority is not absolute but must be considered in light of the impact of provisions of the United States Constitution and the Idaho Constitution which limit the exercise of such authority. For example, a decision by a local school board to hold graduation exercises in a church facility must be carefully scrutinized in light of the fundamental constitutional principle requiring separation of church and state as set forth in the 1st amendment of the United States Constitution and court cases construing this amendment. Indeed, I would suggest that in so doing, a different result may be reached.

While neither the United States Supreme Court nor the Idaho Supreme Court has yet to address the question of whether a school district may hold its graduation exercises in a church facility, and in fact there is a paucity of case law with regard to such a question, those decisions from courts in other jurisdictions addressing similar issues do provide helpful guidance in defining the legal parameters within which a local school board must operate.

In *Miller v. Cooper*, 244 P.2d (N.M. 1952) the Supreme Court of New Mexico held that the holding of graduation exercises in a community church did not violate the constitutional doctrine requiring separation of church and state. In finding that the church was the only building in the community with sufficient seating capacity to accommodate the pupils and the people of the community who desired to attend these functions, the Court concluded that no constitutional violation had occurred.

In a more recent decision, however, a federal district court enjoined a local school district from holding graduation activities in a church on 1st amendment grounds. *Lemke v. Black*, 376 F. Supp. 87 (E.D. Wisc. 1974); vacated 525 F. 2d 694 (7th Cir. 1975). The Court, while recognizing that the use of a church facility by a state agency for a secular purpose is not per se a violation of the 1st amendment, and that a determination that a particular relationship between the state and church is unconstitutional must be made in light of the particular facts and circumstances of each case, found that the context in which the Board's contemplated action arose rendered it constitutionally defective. Critical to the court's decision was its finding that such action by the Board had resulted in increased religious tension between public school students and within the community. The court noted that members of the school district, indeed prospective participants in such activities, had made it known that it violated their consciences to attend the ceremony in that particular church, thereby necessitating a showing by the district that there was an overriding secular need to use those particular facilities. In the absence of such a showing, the Board's decision, in the face of objections from citizens, was found to promote that type of interdependence between religion and state which the 1st amendment was designed to prevent. The fact that students themselves plan the ceremony was not determinative nor was it significant that a slight

minority of students or members of the school district had objected to the Board's intended action. The Court concluded that the district's decision to conduct its graduation ceremonies in a church facility was constitutionally defective and an injunction prohibiting such was issued in response thereto. While this case upon appeal was vacated and remanded without opinion, judicial action which at least raises some question as to the vitality of the case as legal precedent, its reasoning does appear to be sound and should be considered in the development of any response to your question.

Finally, perhaps by way of footnote to the above discussion, I must point out that a preliminary injunction was issued by an Idaho federal district court preventing the Fremont County Joint School District from holding its 1980 graduation exercises in a church facility. *Reiman et al. v. Fremont County Joint School District #215*, Civil Docket #84059 (D. Idaho 1980). While there is little guidance as to the Court's reasoning in taking such action and certainly its preliminary nature renders it of little value as precedent, it should be noted that a criterion for the issuance of such injunction centers on the plaintiff's likelihood of succeeding on the merits of the case. We, therefore, are given at least an indication of what result might be reached by Idaho's federal district court in addressing this question.

In summary, it appears that the question of whether such activities may be conducted in a facility such as a church depends upon the particular facts and circumstances of each case. Given the Board's plenary authority to structure its graduation ceremonies as it deems appropriate, a decision to hold exercises in a church facility may nevertheless be unconstitutional as violative of the well recognized doctrine of separation of church and state. While I have been able to provide general guidance as to the nature of those factors which have been significant to courts in making such a determination, the Board's decision must be evaluated in the context in which it is made. Moreover, given the paucity of legal precedent from which to derive guidance, it would appear that efforts to develop a conclusive response to your question indeed will depend upon future action by the courts. I, therefore, would suggest that any contemplated action by the Board to hold its graduation exercises in a facility such as a church warrants careful consideration by the district's local legal counsel in light of the facts and circumstances surrounding such a decision and existing case law.

Sincerely,
/s/ STEVEN W. BERENTER
Deputy Attorney General
Education

SWB/ms

September 30, 1981

Honorable Atwell J. Parry
Idaho State Senator
District 13
Post Office Box 188
Melba, Idaho 83641

Re: Affect of Right to Farm Bill on existing zoning ordinances.

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION,
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Dear Senator Parry:

You have asked us what effect chapter 45, title 22, *Idaho Code*, entitled "Right to Farm" would have on existing planning and zoning ordinances and whether this chapter would allow the original commencement of an agricultural operation in a zone where it is now prohibited.

Section 22-4501, *Idaho Code*, sets forth the legislative intent about the right to farm. That intent is to protect existing agricultural operations from nuisance suits brought on by encroaching urban areas and the subsequent incompatibility of residential and some agricultural uses.

There is no apparent expression of intent authorizing new agricultural operations in urban areas, rather the intent clearly seems to be to protect the pre-existing agricultural operations. This interpretation is further supported by the language in §22-4503, wherein it is stated that:

No agricultural operation or an appurtenance to it shall be or become a nuisance private or public by any changed conditions in or about the surrounding non-agricultural activities after the same has been in operation for more than one year when the operation was not a nuisance at the time the operation began . . .

The statute does not protect improper negligent operations which may result in a nuisance. The agricultural activity must be operated in a safe and proper manner in order to be protected by the statute.

Section 22-4504 voids any existing or future local government ordinance which would be contrary to the expressed intent of the act. For example, if existing ordinances prohibit agricultural operations in residential areas and there is an existing agricultural operation either in a residential area or an existing agricultural area is zoned residential in the future, the prohibitions against agricultural operations would not have any effect upon pre-existing agricultural uses so long as they were operated in a proper and safe manner.

In summary, the apparent express purpose of the act is to provide "grandfather" protection for pre-existing agricultural uses that may be surrounded by urban development in the future.

In answer to the first question then, it would be our opinion that the Right to Farm Act's effect on existing planning and zoning ordinances would be to void any of those ordinances so far as they relate to pre-existing agricultural uses. To be protected the agricultural use must have been in existence at least one year prior to passage of the zoning ordinance or the change in zone and must be operated in a safe and proper manner.

In answer to your second question, the Right to Farm Act does not provide protection for new agricultural operations in zones where they are currently prohibited. If the agricultural use was not in effect prior to the passage of the zoning ordinance, it would not be protected by the act. It is clearly the intent of the act to protect pre-existing operations, not to authorize the commencement of new operations in areas where those operations are prohibited.

LEGAL GUIDELINES OF THE ATTORNEY GENERAL

If you have further questions about this or any other matter, please contact us.

Sincerely,
/s/ ROBIE G. RUSSELL
Deputy Attorney General
Division Chief
Local Government Division

October 6, 1981

The Honorable Laird Noh
Route 1, Box 65
Kimberly, Idaho 83341

Re: Lay Midwives

**THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION,
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE**

Dear Senator Noh:

Reference is made to your letter dated June 29, 1981, concerning the issues surrounding lay midwives in Idaho. The following questions were addressed in your letter.

- (1) Whether the practice of lay mid-wifery may be in conflict with the Idaho statutes concerning the practice of medicine.
- (2) Is there a legal requirement that all children be registered with the Bureau of Vital Statistics?
- (3) If children are registered, is it required that it be indicated if the attendant at the birth was a midwife?

The Court of Criminal Appeals for the State of Texas in the case of *Banti v. State*, (1956), 289 S.W. 2d 244, addressed a case wherein the defendant was prosecuted for the offense of unlawfully practicing medicine while acting as a midwife and assisting a woman at childbirth. In this Texas case, the court reversed the conviction below and held that the Legislature of the State of Texas had not defined the practice of medicine so as to include the act of a midwife assisting women in childbirth. The complaint against the defendant in this case was brought under Article 741(2), Vernon's Annotated Penal Code, which prohibits a person from treating or offering to treat a woman "for a disease, disorder, deformity or injury or effect a cure thereof." The court held at page 247:

It would appear that the Legislature of Texas has not defined the practice of assisting women in parturition or childbirth in so far as the practice of medicine without registering a certificate evidencing the right to so practice is made punishable as an offense.

* * *

We agree that childbirth is a normal function of womanhood, and that proof that appellant for a consideration agreed to and did attend Julia Valdez at childbirth does not support the allegation of the complaint and information that she treated or offered to treat Julia Valdez for a disease, disorder, deformity or injury or effect a cure thereof.

The *Idaho Code* sections dealing with the unauthorized practice of medicine are found at *Idaho Code* §54-1800 et seq. and the practice of medicine is defined at *Idaho Code* §54-1803 as follows:

- (1) The 'practice of medicine' means:
 - (a) To investigate, diagnose, treat, correct, or prescribe for any human disease, ailment, injury, infirmity, deformity, or other condition, physical or mental, by any means or instrumentality . . .

Idaho Code §54-1804 then goes on to prohibit the unlicensed practice of medicine as follows:

- (2) Except as provided in Subsection (1) of this section, it is unlawful for any person to practice medicine in this state without a license and upon conviction thereof, he shall be imprisoned for not less than six (6) months nor more than one (1) year, or shall be fined not less than one thousand dollars (\$1,000.00) nor more than three thousand dollars (\$3,000.00), or shall be punished by both fine and imprisonment.

The Supreme Court of the State of California has more recently interpreted the California statutes prohibiting the unlicensed practice of medicine, which statutes more closely resemble the wording of the *Idaho Code*. In the case of *Bowland v. Mun. Ct. for Santa Cruz Cty. Etc.* (1976) 556 P.2d 1081, three women were charged with the unlicensed practice of medicine in that they held themselves out as midwives even though they did not have valid licenses to perform midwifery.

The Supreme Court of California held that although pregnancy is not a "sickness or affliction" within the meaning of that phrase as used in the applicable statute, it is a "physical condition" within the contemplation of the statute. The applicable statute, Business and Professions Code Section 2141 provides as follows:

Any person who practices or attempts to practice or who advertises or holds themselves out as practicing any system or mode of treating the sick or afflicted in this state, or who diagnoses, treats, operates for, or prescribes for any ailment, blemish, deformity, disease, disfigurement, disorder, injury or other mental or physical condition of any person, without having at the time of so doing a valid, unrevoked certificate as provided in this chapter, or without being authorized to perform such act pursuant to a certificate obtained in accordance with some other provision of law, is guilty of a misdemeanor.

With respect this California statute, the California Supreme Court held at page 1083:

It may be seen that the latter section appears to proscribe two types of medically related activities. It is unlawful, first, for an unlicensed per-

son to practice or hold himself out as practicing any "system or mode of treating the sick or afflicted"; second, the prohibition extends to any actual diagnosis, treatment, surgery or prescription for a "mental or physical condition," whether or not such activities comprise a system or mode of treating the sick or afflicted.

The Court went on to hold at page 1084:

We have concluded that although pregnancy is not a "sickness or affliction," it is a "physical condition" within the contemplation of Section 2141. So construed, that section prohibits unlicensed persons from diagnosing, treating, operating upon or prescribing for a woman undergoing normal pregnancy or childbirth, and the reference in the complaint to those of Plaintiffs' alleged practices which, under Section 2140, are to be performed only by certificated midwives, is adequate notice of the acts constituting the offense charged. We hold further that Section 2141 is not unconstitutionally broad or vague, nor does it violate the prospective mother's right to privacy.

Therefore, as can be seen, the California Supreme Court focused its decision on that part of the California statute which prohibited the treatment of a "physical condition," and held that treating a woman undergoing normal pregnancy or childbirth falls within that phrase. As can be noted by viewing *Idaho Code* §54-1803(1) (a), to "treat" a "condition, physical or mental," qualifies as the practice of medicine, and such practice of medicine performed without a license is prohibited at *Idaho Code* §54-1804.

Although there are presently no Idaho Supreme Court cases on the subject, the Idaho courts might well adopt the reasoning of the California Supreme Court in the *Bowland* case and hold that treating a woman undergoing normal pregnancy or childbirth by a lay midwife is equivalent to treating a physical condition and therefore would fall under the proscription of the Idaho Medical Practices Act.

The next question asked in your letter concerned whether the birth of all children in the State of Idaho must legally be registered with the Bureau of Vital Statistics. *Idaho Code* §39-256 requires the registration of each birth which occurs in this state with the local registrar of the district in which the birth occurs.

In answer to your last question concerning the necessity that it be indicated whether the attendant at the birth was a midwife, *Idaho Code* §39-256 requires that the certificate be prepared and filed by the physician, "or other attendant in attendance at such birth." Each birth certificate on its face requires the name and title of the attendant at the birth. The title is often vague, e.g. "friend" or "midwife" and there is no specific legal requirement that the term "midwife" be used to describe such an attendant at birth.

If I can be of any additional assistance in this matter please inquire further.

Sincerely yours,
/s/ MICHAEL E. JOHNSON
Chief, Legal Services Division

MEJ/ms

December 10, 1981

Mrs. Carmen Evans
City Supervisor
City of Kamiah
Post Office Box 338
Kamiah, ID 83536

Re: Dog Control Ordinances

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION,
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Dear Mrs. Evans:

You have asked whether the ordinances of the City of Kamiah relative to dog control apply to dogs belonging to Nez Perce Indians who reside within the city limits of Kamiah. As you pointed out in your correspondence, Kamiah is located within the external boundaries of the Nez Perce Indian Reservation.

As a general rule of law, Indian reservations, as federal enclaves, are subject to the jurisdiction of the federal government and not that of the state within which the federal enclave is located. States have no inherent jurisdiction over Indian affairs within Indian reservations unless so authorized by federal statute or case law, *Boyer v. Shoshone-Bannock Indian Tribes*, 92 Idaho 257, 441 P.2d 167 (1968). Public Law 280, 67 Statutes at Large 589, 18 U.S.C. 1162, 1360 is such a federal grant of authority. It provides in part that:

The consent of the United States is hereby given to any other state not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided in this act, to assume jurisdiction at such time and in such manner as the people of the state shall, by affirmative legislative action, obligate and bind the state to assumption thereof.

Idaho's affirmative adoption of the federal grant of authority contained in Public Law 280 is found at §67-5101, et seq., *Idaho Code*. Therein the State of Idaho assumed jurisdiction over seven areas of concern, including compulsory school attendance, juvenile delinquency, dependent children, mental illness, public assistance, domestic relations, and motor vehicle operations. Section 67-5102, *Idaho Code*, provides for the additional assumption of state jurisdiction concerning matters contained within Public Law 280 with the consent of the tribal governing body. The statute says in part that:

In every case the extent of such additional jurisdiction shall be determined by a resolution of the tribal governing body and become effective upon the tribe's transmittal of the resolution to the attorney general of the State of Idaho.

The Nez Perce Tribe has adopted such a resolution entitled "Tribal Resolution No. 65-126" which provides for tribal jurisdiction over matters involving tribal game regulations and vests in state courts jurisdiction over civil causes of action and criminal matters, including cruelty to animals, disturbing the peace, public nuisances and the abatement thereof, and trespassing.

It has been widely held that municipal corporations can "regulate, restrain and prohibit the running at large of domestic animals . . . upon the highways, streets and in public places or on the private property of others." 7 McQuillin on Municipal Corporations, §24.300. The power to so regulate is based upon the general police power of the local government and its corresponding authority to declare and abate public nuisances. See *Best v. Broadhead*, 18 Idaho 11, 108 P. 333 (1909).

Since the State of Idaho has assumed jurisdiction over Indian reservations under Public Law 280 and with the consent of the Nez Perce Tribe, has assumed jurisdiction over the Nez Perce Indian Reservation for matters relating to public nuisances, trespassing, and the like, and since animals running at large are a public nuisance, it is our opinion that the City of Kamiah does have the authority to enact dog control ordinances within the bounds of the Nez Perce Indian Reservation. Furthermore, those ordinances would apply to Nez Perce Indians who reside within the city limits of Kamiah.

It is not necessary for us to determine the status of the lands in question. Suffice it to say that the city would have jurisdiction absent Public Law 280 if the lands occupied by the tribal member were not trust lands.

If we may be of further help to you on this or any other matter, please call upon us.

Sincerely,
/s/ ROBIE G. RUSSELL
Deputy Attorney General
Local Government Division

RGR/tl

cc: Dennis Albers
Idaho County Prosecuting Attorney
Grangeville, ID

December 11, 1981

Gary L. Montgomery
Idaho State House of Representatives
737 N. Seventh Street
Boise, ID 83702

**THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION,
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE**

Dear Representative Montgomery:

Attorney General David Leroy has asked me to respond to your letter of November 5, 1981, in which you request legal guidance concerning the provision of transportation services by the state's public school districts to students attending private or parochial schools. You have specifically asked whether Idaho statutory law which allows for the provision of transportation services to such students is valid and enforceable given the holding of the Idaho Supreme Court in *Epeldi v Engelking*, 94 Id, 390, 488 P.2d 860 (1971).

As you have noted in your letter, *Idaho Code* §33-1501 provides in relevant part that the board of trustees of each public school district shall, where practicable, provide transportation for the public and private school pupils of the district. By the very letter of such a provision it would appear that it was the intent of the legislature that the school districts provide transportation not only for public school students within each district but those students attending private or parochial schools as well.

The Idaho Supreme Court, however, in *Epeldi, supra*, found the provision of such transportation services to parochial students to be unconstitutional in light of its construction of Article 9, Section 5 of the Idaho Constitution. That section provides in relevant part that neither the legislature nor any school district shall ever make any appropriation, or pay from any public fund anything in aid of any church or sectarian society, or for any sectarian or religious purpose, or to help support or sustain any school or academy controlled by any church, sectarian or religious denomination. The Court while recognizing that the United States Supreme Court in *Everson v. Board of Education*, 330 U.S. 1, 67 S. Ct. 504, 91 L.ED. 711 (1947), has held that the payment of public funds to parents for the transportation of students to parochial schools did not violate the establishment clause of the 1st Amendment to the Constitution of the United States, found that the language of Article 9, Section 5 indicated a more positive enunciation of the separation between church and state than did the United States Constitution. Impressed with the restrictive language of such a provision, the Court concluded that the provision of transportation services to parochial school students was indeed in aid of such schools and therefore prohibited by Article 9, Section 5 of the Idaho Constitution. The Court then went on to find that the denial of such services to parochial school students did not violate the equal protection clause of the 14th Amendment nor the free exercise clause of the 1st Amendment to the Constitution of the United States. Relying upon the holding of *Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790, 1010 L. ED. 2d 965 (1963) in which the United States Supreme Court held that a state may not limit a citizens' acceptance of public welfare benefits on the foregoing of a practice or precept of his/her religion unless the state can show a paramount interest, the Court found that the state had met such a burden in light of its paramount interest in implementing a fundamental policy against the state's establishment of religion. The Court's conclusion as to the impropriety of providing busing services to such students was thereby confirmed.

You have raised the question, however, whether the holding of the Idaho Supreme Court in *Epeldi, supra*, has been sufficiently mitigated by recent developments in this area of the law as to revitalize in effect the relevant provisions of *Idaho Code* §33-1501. Certainly there has been a great deal of case law in which courts in other jurisdictions have construed similar state constitutional provisions to allow for the provision of transportation services to students enrolled in private and parochial schools. See, e.g., *Members of the Jamestown School Comm. v. Schmidt*, 405 A. 2d 16 (R.I. 1979); *Board of Education, School District No. 12, Cook City v. Bakalis*, 299 N.E. 2d 737 (Ill 1973). However, other courts in addressing similar language in their state's constitution have reached the same conclusion as that reached by the Idaho Supreme Court in *Epeldi*. See e.g., *Gaffney v. State Department of Education*, 220 N.W. 2d (Neb. 1974). It therefore would appear that there simply is no unanimity among the courts with regard to this issue, and the results of each case generally depend upon each respective court's approach to and construction of those state constitutional provisions which address the provision of public aid to entities of a religious or sectarian nature.

Furthermore, I have been unable to locate any decision emanating from the United States Supreme Court which would necessarily dictate a different conclusion than that found in *Epeldi*. While the Supreme Court in *Everson*, *supra*, did hold that the provision of transportation services to private and parochial students did not violate the establishment clause of the 1st Amendment to the Constitution of the United States, the Court's decision in *Epeldi* found its basis not in a federal constitutional analysis but rather in the Court's construction of a state constitutional provision which, in its judgment, mandated a different result than that reached by the United States Supreme Court in *Everson*. Similarly, it has been suggested by some commentators that dicta in the Court's opinion in *Everson* at least arguably supports the position that notwithstanding state constitutional language which would prohibit the provision of transportation services to parochial school students, such a denial nevertheless would be in violation of the free exercise clause of the 1st Amendment to the Constitution of the United States and thereby would be prohibited. 41 A.L.R. 3d 350, in reference to *Everson*, 330 U.S. at 16. Indeed, as you have noted, the dissent in *Epeldi* expressed the view that the denial of transportation services to parochial students is not only in violation of the free exercise clause of the 1st Amendment but also violates the equal protection clause of the 14th Amendment, and at least one court has so concluded. *State ex rel. Hughes v. Board of Education*, 174 S.E. 2d 711 (W. Va. 1970); (the Idaho Supreme Court has expressly disagreed with and distinguished the holding of *State ex rel. Hughes*. *Epeldi*, 94 Id. at 396). Yet, there has been no further indication by the courts which would suggest that a different result than that reached by the majority in *Epeldi* with regard to these arguments is required. Indeed, case law would appear to indicate otherwise.

In the case which you have cited in your letter, *Meek v. Pittenger*, 421 U.S. 349, 95 S. Ct. 1753, 44 L.E. 2d 217 (1975), the United States Supreme Court addressed the constitutional propriety of a number of statutes enacted by the Commonwealth of Pennsylvania which allowed for the provision of a variety of services to non-public schools and to children enrolled therein. The Court, in its evaluation of the constitutionality of such statutes relied upon those standards developed by the court for the analysis of statutes of this nature under the establishment clause of the 1st Amendment. In upholding the Commonwealth's lending of textbooks to students enrolled in non-public schools, yet striking down the lending of instructional materials and equipment and the provision of auxiliary services which included counseling, therapy and other teaching services for targeting groups of students, all to be provided on non-public school grounds, the Court looked to the secular nature of the services to be provided, their intended beneficiaries, and the degree of entanglement incurred as the result of such action by the Commonwealth. Because the Court found that the provision of many of these services was in violation of the establishment clause of the 1st Amendment, a discussion of whether the denial of such services was in violation of the free exercise clause of the 1st Amendment or the equal protection clause of the 14th Amendment was not germane to the Court's decision. See, also, *Springfield School District v. Department of Education*, 397 A. 2d 1154 (Penn. 1979). However, the United States Supreme Court has affirmed without opinion a federal district court decision in which the court found, as did the Idaho Supreme Court in *Epeldi*, that a state's constitutional policy of promoting the separation of church and state to a higher degree than that required by the 1st Amendment as reflected in the state's denial of busing services to pupils attending church related schools constitutes a compelling state interest necessary to satisfy any possible infringement of the free exercise clause of the 1st Amendment to the Constitution of the United States.

The District Court further concluded that such a denial of services did not create an arbitrary and capricious classification which would unconstitutionally deny equal protection of the law. *Leutkemeyer v. Kaufman*, 364 F. Supp. 376 (W.D. Mo. 1973); *affm.*, 419 U.S. 888, 95 S. Ct. 167, 42 L. Ed. 2d 134 (1974).

It therefore would appear that unless and until the Idaho Supreme Court overrules its decision in *Epeldi*, or the United States Supreme Court more clearly delineates those constitutional restrictions under the free exercise clause of the 1st Amendment or the equal protection clause of the 14th Amendment as to prohibit the denial of transportation services to parochial school students, the provision of such services to parochial students pursuant to *Idaho Code* §33-1501 is prohibited by Article 9, Section 5 of the Idaho Constitution.

Sincerely,
/s/ STEVEN W. BERENTER
Deputy Attorney General
Education

SWB/ms

December 30, 1981

Mr. James C. McAdoo
Timberlands Manager
Potlatch Corporation
Post Office Box 1016
Lewiston, ID 83501

**THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION,
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE**

Dear Jim:

In your letter of November 16, 1981, you asked for my evaluation of the position of the Idaho Department of Health and Welfare that compliance with best management practices under the Idaho Forest Practices Act did not necessarily insure compliance with their water quality standards regulations. Based on the information provided me and my analysis of the applicable statutes and regulations, I have concluded that the regulations were interpreted correctly by Health and Welfare.

As I understand it, the Forest Service has proposed a timber harvest management plan for what it calls the "Soda Point — Four Mile Assessment Area." The critical stream drainage in this area is Meadow Creek. Due primarily to sedimentation in connection with road building, the Forest Service itself projected a potential loss of approximately twenty percent of the fisheries resources in that stream. There was some indication in the assessment that there could be a greater loss in tributary streams. The Forest Service documents provided to me were very vague about the duration of this loss and period of time, if ever, that the stream could be expected to restore itself to its present condition. Nor could I find much discussion to place into context this anticipated loss with stream drainages or fisheries not affected by present or proposed future logging activities. The assessment did conclude that the water quality in this drainage was high:

All fish habitat sampled rated good to excellent, based on the ocular method of survey. The drainage is essentially pristine. The stream exhibited a well balanced pool:riffle:run ratio, stable banks, and good riparian vegetation.

Game fish species observed were rainbow, cutthroat, and Dolly Varden. Only cutthroat trout were observed above the falls section. Chinook salmon are also present.

Apparently based exclusively on the Forest Service's own conclusions, the Department of Health and Welfare concluded that the Forest Service proposal was not compatible with Idaho water quality standard §1-2300.02(b). The Forest Service apparently questioned the opinion of the Department, and, in a letter dated September 8, 1981, the Department reaffirmed its position:

The Department recognizes that §1-2300.02(b) must be interpreted flexibly or it could interfere with virtually any proposed project. However, §1-2300.02(b) is clearly intended to prohibit major injury to designated uses. In the Department's opinion, a 20 percent decrease in fishery potential is unquestionably a major injury.

The Forest Service and the timber industry are concerned that such an interpretation could significantly reduce all future public and private timber harvesting. While I share your concerns that an extreme interpretation of the water quality standards could lead to such a result and that amendment of the applicable regulations may be necessary to assure greater certainty of interpretation, I have to agree with the conclusion of your hydrologist that the Department "is correct about the law." This office of course would not counsel or support any extreme interpretation if one is advanced in the future.

The Health and Welfare water quality standards have been adopted pursuant to the Idaho Administrative Procedures Act, §§67-5201, et seq., *Idaho Code*, including legislative approval. Those regulations provide, at §1-2300.02, that:

- .02 *Discharges Which Result in Water Quality Standards Violations.* No pollutant may be discharged from a single source or in combinations with pollutants discharged from other sources in concentrations or in manner that:
- (a) Will or can be expected to result in a violation of water quality standards applicable to the receiving water body or downstream waters; or
 - (b) Will injure designated or protected beneficial uses.

Designated or protected beneficial uses include wildlife habitat, §1-2101.02; cold water biota, §1-2101.03; and salmonid spawning habitat, §1-2100.05. Compliance with best management practices such as the "Idaho Forest Practice Rules" (see §1-2300.05) will exempt compliance with §1-2300.02(a) relating to violation of water quality standards but will *not* exempt compliance with §1-2300.02(b) which prevents injury to designated or protected beneficial uses:

- .04 *Limitations to Nonpoint Source Restrictions.* So long as a nonpoint source activity is being conducted in accordance with applicable rules,

regulations and best management practices as referenced in Manual Section 1-2300.05, or in the absence of referenced applicable best management practices, conducted in a manner that demonstrates a knowledgeable and reasonable effort to minimize resulting adverse water quality impacts, the activity will not be subject to conditions or legal actions based on Manual Sections 1-2300.01 or 1-2300.02(a).

This interpretation is buttressed by the Idaho Forest Practice Rules themselves which state in their introduction that:

Those persons conducting a forest practice should be cognizant of additional laws and rules that may apply, which are administered by other governmental agencies. In particular, the Idaho Department of Water Resources and the Idaho Department of Health and Welfare have adopted rules pertinent to some operations involved in conducting a forest practice.

In addition, the Idaho Forest Practices Act and regulations thereunder have not, to my knowledge, been certified by the EPA (I note that your hydrologist states otherwise, and I would welcome any information he might have).

As an enclosure to your letter you referred us to comments from your corporation to the Department in connection with the adoption of the rules that the use of best management practices in connection with nonpoint source activities would constitute compliance with the water quality standards. Legislative history in Idaho is normally nonexistent, and I have not been able to find anything to shed more light on the adoption of the present standards. But I would have to note that the language which your corporation suggested was ultimately not incorporated into the standards and that, as worded, the standards are clear on their face. The interpretation of the present regulations proposed by the Forest Service, when taken to its extreme, could conceivably allow for the complete destruction of a stream as long as best management practices were followed (although I assume and hope that the Forest Service would conclude that such environmental degradation would normally not outweigh the benefits involved from the proposed activity).

As you are aware, courts and legislatures provide a great deal of discretion to administrative agencies to interpret the statutes and regulations they must enforce. I would note that this apparently is the first instance in which the Department of Health and Welfare has objected to a timber sale on either state, private, or federal lands based upon this regulation. This indicates to me that they have not yet been overly rigid in their interpretation of the regulation.

If, however, you feel that the regulations should be clarified to include such factors as area wide assessment, long term perspectives, and natural water quality degradation through forest decay, fire, epidemic, wind, or other natural climatic events, my staff and I would be more than willing to work with you. In addition, I note that the Department of Health and Welfare would also be willing to work with you or the Forest Service to better define the applicable standards or to work out acceptable harvest alternatives. Any such amendment, however, would ultimately have to be adopted through the Administrative Procedures Act.

Please advise me or Don Olowinski of my staff if you feel we can be of further assistance in this matter.

Sincerely,
/s/ DAVID H. LEROY
Attorney General

DHL/tl

cc: Louise Shadduck

bcc: Les Purce
Lee Stokes
Jack Hockberger
Jack Gillette
Gordon Trombley

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